[redacted]

Supreme Court of the United States

[redacted]

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM J. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, PETITIONERS,

vs.

THE UNITED STATES

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, PETITIONER,

vs.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 7, 1933.

CERTIORARI GRANTED OCTOBER 10, 1933.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, PETITIONERS,

vs.

THE UNITED STATES

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

INDEX.

	Original	Print
Record from Court of Claims	1	1
Petition in No. 43001	1	1
Exhibit "A"—Letters testamentary	11	5
Exhibit "B"—Check, March 15, 1930	12	5
Exhibit "C"—Check, June 14, 1930	13	6
Exhibit "D"—Check, September 15, 1930	14	7
Exhibit "E"—Check, December 15, 1930	15	8
Exhibit "F"—Check, January 6, 1932	16	9
Exhibit "G"—Claim for refund	17	10
Exhibit "H"—Letter of Commissioner of Internal Revenue, May 9, 1933	27	17
Exhibit "I"—Letter of Commissioner of Internal Revenue, April 24, 1933	28	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 14, 1938.

—6191

Record from Court of Claims—Continued.	Original	Print
General traverse	30	19
Substitution of attorneys	30	19
Petition in No. 43002	31	19
Exhibit "A"—Letters testamentary	38	23
Exhibit "B"—Check, March 15, 1930	39	24
Exhibit "C"—Check, June 14, 1930	40	25
Exhibit "D"—Check, September 15, 1930	41	26
Exhibit "E"—Check, December 15, 1930	42	27
Exhibit "F"—Claim for refund	43	28
Exhibit "G"—Letter of Commissioner of Internal Revenue, May 9, 1933	53	35
Exhibit "H"—Letter of Commissioner of Internal Revenue, April 24, 1933	54	35
General traverse	56	36
Substitution of attorneys	56	36
Argument and submission of cases	56	37
Special findings of fact	57	37
Conclusion of law (43001)	64	44
Conclusion of law (43002)	64	44
Opinion of the Court, Green, J.	65	45
Judgment in No. 43001	69	47
Judgment in No. 43002	69	48
Proceedings after entry of judgment	69	48
Clerk's certificate.....(omitted in printing)..	70	
Orders allowing certiorari	71	49

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 43001

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. Frothingham, as Executors of the Estate of Alexander M. White, Plaintiffs,

against

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed May 8, 1935

To the Honorable Judges of the Court of Claims of the United States:

The petition of Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as and only as Executors of the Estate of Alexander M. White, deceased, by Cotton, Franklin, Wright & Gordon, their attorneys, respectfully shows to this Court and alleges:

1. That Alexander M. White died on September 21, 1929, a citizen of the United States and of Oyster Bay, Nassau County, State of New York.

[fol. 2] 2. That on November 11, 1929, the Last Will and Testament of said Alexander M. White, dated September 13, 1928, was duly admitted to probate by the Surrogates' Court of the State of New York, Nassau County, and letters testamentary thereon were issued by said Court to Harold T. White of Bedford, Westchester County, State of New York, Alexander M. White, Jr., Oyster Bay, Nassau County, State of New York, and William I. Frothingham, Glen Cove, Nassau County, State of New York, a certificate of which is attached hereto marked Exhibit "A" and incorporated herein, and that said Harold T. White, Alexander M. White, Jr., and William I. Frothingham duly qualified as Executors of the estate of said decedent and are now acting in that capacity.

3. That petitioners, pursuant to the Revenue Act of 1928 and the Regulations in such cases made and provided, duly filed on or before March 15, 1930 a federal income tax return for Alexander M. White, deceased, for the taxable period from January 1, 1929 to September 21, 1929, report-

ing next taxable income on which a tax of $15,036.89 was computed to be payable.

4. That petitioners caused to be paid by check to the Collector of Internal Revenue for the Second District of New York on account of the tax due on the return as filed for the taxable period January 1, 1929 to September 21, 1929 an aggregate amount of $15,036.89 by making the following installment payments, to wit: $3,759.23 on March 15, 1930, $3,759.22 on June 14, 1930, $3,759.22 on September 15, 1930 [fol. 3] and $3,759.22 on December 15, 1930; photostatic copies of the said checks are attached hereto, marked Exhibits "B", "C", "D" and "E" and incorporated herein.

5. That on October 7, 1931, the Commissioner of Internal Revenue assessed against your petitioners' decedent additional income taxes of $12,509.74 for the taxable period January 1, 1929 to September 21, 1929; that written notice and demand for the payment of said assessment, duly signed by William Duggan as Collector of Internal Revenue for the Second District of New York, was made and served upon your petitioners.

6. That on January 8, 1932, petitioners caused to be paid by check to the Collector of Internal Revenue the further aggregate amount of $13,831.49 on account of the additional assessment of $12,509.74 and interest thereon to the date of payment of $1,321.75, a photostatic copy of which check is attached hereto, marked Exhibit "F" and incorporated herein.

7. That on December 15, 1932, petitioners duly filed in detail and under oath, according to the provisions of law in that regard and the Regulations of the Secretary of the Treasury established in pursuance thereof, their written claim for refund of $13,246.94, or such greater amount as might be legally refundable, on Form 843, based upon their right to deduct under Section 23(e) of the Revenue Act of 1928 a loss of $104,500 sustained on 1100 shares of the Preferred Stock of Del Bay Farms, Incorporated, a full true [fol. 4] and correct copy of which claim is attached hereto, marked Exhibit "G" and incorporated herein.

8. That on May 9, 1933, the Commissioner of Internal Revenue by registered letter rejected said claim for refund, a true and correct copy of which letter is attached hereto, marked Exhibit "H" and incorporated herein, for the rea-

son as set forth in the Treasury Departments' letter dated April 24, 1933, a photostatic copy of which letter is attached hereto, marked Exhibit "I" and incorporated herein, that said loss was a capital loss and therefore deductible under Section 101 of the Revenue Act of 1928.

9. That Alexander M. White, the decedent, from time to time between February 18, 1925 and March 17, 1927, inclusive, purchased for sums aggregating $110,000 certain 7-Year 6% Mortgage Bonds, due December 1, 1931, of Seabrook Co., a corporation incorporated under the laws of the State of New Jersey; that the name of Seabrook Co. was subsequently changed to Del Bay Farms, Inc., that thereafter in 1927 a receiver in equity was appointed for said Del Bay Farms, Inc. (in this paragraph sometimes referred to as the "old company") and said corporation was liquidated; that the holders of said 7-Year 6% Mortgage Bonds purchased at foreclosure sale the corporate properties pledged under the mortgage securing said 7-Year 6% Mortgage Bonds and organized under the laws of the State of Delaware, Del Bay Farms, Incorporated (in this paragraph [fol. 5] sometimes referred to as the "new company") to hold and operate the properties so purchased at foreclosure sale; that Alexander M. White, the decedent, exchanged his 7-Year 6% Mortgage Bonds of the old company for 1,100 shares of Preferred stock of $100 par value per share of the new company; that said exchange was a non-taxable exchange and the cost basis of the 1,100 shares of Preferred stock of the new company was $110,000, to wit, the amount originally paid for the 7-Year 6% Mortgage Bonds of the old company; that the business of Del Bay Farms, Incorporated, the new company, proved unsuccessful; that during the year 1929 Del Bay Farms, Incorporated, the new company, sold its corporate properties, closed its office and ceased its activities; that in complete liquidation Del Bay Farms, Incorporated, the new company, paid a liquidating dividend of $5.00 per share on its outstanding Preferred stock; that on May 9, 1929, Alexander M. White, the decedent, received his proportion of said liquidating dividend amounting to $5,500; that Alexander M. White, the decedent, sustained a loss under Section 23(e) of the Revenue Act of 1928 of $104,500 on his 1,100 shares of Preferred stock of Del Bay Farms, Incorporated, the new company, to wit: the difference between $110,000, the cost basis of said 1,100

shares of Preferred stock, and $5,500 the liquidating dividend received from Del Bay Farms, Incorporated, the new company; that a loss of $104,500 was claimed on account of said transaction in Item 15, of the return filed by your petitioners for the period January 1, 1929 to September 21, 1929.

[fol. 6] 10. That the Commissioner of Internal Revenue has denied petitioners' right to deduct, under Section 23(e) of the Revenue Act of 1928, the loss of $104,500 referred to in paragraph 9 hereof, illegally claiming that said loss constituted a capital loss deductible only to the extent and in the manner provided in Section 101 of the Revenue Act of 1928, and has made the additional assessment referred to in paragraph 5 hereof against the plaintiffs on account of said determination; that the tax paid on account of said determination and additional assessment has been wrongfully, erroneously and illegally assessed and collected from the plaintiffs.

11. Petitioners are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way volunteered, aided, abetted or given encouragement to rebellion against said Government, and that they are the sole and absolute owners of the claim herewith presented; and that they have made no transfer or assignment of said claim or of any parts thereof, and that petitioners are justly entitled to the amounts claimed herein from the United States after allowing all just credits and set offs.

Wherefore, petitioners pray judgment in their favor and against the United States of America for the sum of $13,246.94 with interest at the rate of 6% per annum from January 7th, 1932, together with the cost of this action, and for [fol. 7] such other relief as may to this Honorable Court seem just and proper.

Harold T. White, Executor of the Estate of Alexander M. White. Alexander M. White, Jr., Executor of the Estate of Alexander M. White. Cotton, Franklin, Wright & Gordon, Attorneys for Petitioners. Office and P. O. Address, 63 Wall Street, Borough of Manhattan, City of New York. Charles C. Parlin, John P. Ohl, of Counsel.

[fols. 8-10] *Duly sworn to by Harold T. White, et al. Jurats omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

The People of the State of New York to all to whom these presents shall come or may concern, send Greetings:

Know ye, That we, having inspected the Records of our Surrogate's Court in and for the County of Nassau do find that on the 11th day of November, one thousand nine hundred and twenty-nine, Letters Testamentary of the estate of Alexander M. White, late of the County of Nassau, deceased, were granted by said Court unto Alexander M. White, Jr., Cove Neck, Oyster Bay, N. Y., Harold T. White, Bedford Hills, N. Y., and William I. Frothingham, Glen Cove, N. Y., Executors, named in the last Will and Testament of said deceased, and that said Letters have not been revoked.

In Testimony Whereof, we have caused the seal of the Surrogate's Court of the County of Nassau to be hereunto affixed.

Witness, Hon. Leone D. Howell, Surrogate of our said County of Nassau, at the Surrogate's Office at Mineola, in the said County, this 3rd day of May, in the year one thousand nine hundred and thirty-five.

J. Henry Dreyer, Deputy Clerk of the Surrogate's Court. (L. S.)

[fol. 12] EXHIBIT "B" TO PETITION

No. 29366

New York March 15 1930.

First National Bank

302426

Pay to the order of Collector of Internal Revenue 2nd District New York Thirty seven hundred and fifty nine 23/100 Dollars.

MAR.

$3759 23/100

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Mar 21 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
35 Mar 22 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Mar 15 1930
Received
2nd District, N. Y.

[fol. 13] EXHIBIT "C" TO PETITION

No. 30055

New York June 14th 1930

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York Three thousand seven hundred fifty nine & 22/100 Dollars.

$3759 22/100
14 172

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Jun 14 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
89 Jun 16 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Jun 14 1930
Received
2nd District, N. Y.

[fol. 14] EXHIBIT "D" TO PETITION

No. 30537

New York Sept. 15th 1930

15 189

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York, Three thousand seven hundred fifty nine & 22/100 Dollars.

$3759 22/100

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Sep 15 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
15 Sep 6* 1930

Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Sep 15 1930
Received
2nd District, N. Y.

[fol. 15] EXHIBIT "E" TO PETITION

No. 31144

New York Dec. 15th 1930

15 186

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York, Three thousand seven hundred fifty nine & 22/100 Dollars.

$3759 22/100

W. A. & A. M. White.

2 B
Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

Dec 15, 1930
No Protest

William Duggan, Acting
Collector of Internal Revenue
Custom House, N. Y. City

---

* So on the original; should be "16." Evidently the stamp was not applied with sufficient pressure.

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
25 Dec 16 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Dec 15 1930
Received
2nd District, N. Y.

[fol. 16] EXHIBIT "F" TO PETITION

No. 33194

New York Jany. 6th 1932

9 115

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York, Thirteen thousand eight hundred and thirty one 49/100 Dollars.

$13831 49/100

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Jan 9 1932

William Duggan,
Collector of Internal Revenue
Custom House, N. Y. City

2 B

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
29 Jan 11 193*

*So in the original; should be "1932." Evidently the stamp was not applied with sufficient pressure.

Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Jan 8 1932
Received
2nd District, N. Y.

[fol. 17]
[Ex. "F"]

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June, 1930

EXHIBIT "G" TO PETITION

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date received)

× REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps
ALEXANDER M. WHITE (died September 21, 1929)
CLAIM OF
[Business address]* HAROLD T. WHITE, et al, Executors
[Residence]* c/o W. A. & A. M. White, 40 Wall Street, New York N. Y.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Second District of New York.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1929, to September 21, 1929.
3. Character of assessment or tax INCOME TAX
4. Amount of assessment, $27,546.63 and int. dates of payment $3,759.23 on 3/15/30, $3,759.22 on 6/15/30,
5. [Date stamps were purchased from the Government]* 9/15/30 & 12/15/30; 12,509.74 & 1,321.75 int. on 1/8/32.
6. Amount to be refunded $13,246.94 and int.
7. Amount to be abated (not applicable to income or estate taxes) $.....
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1928, on January 8, 1934.

*[Matter enclosed in brackets, struck out in copy.]

The deponent verily believes that this claim should be allowed for the following reasons:

[fol. 18] I. Statement of Facts.—Between February 18, 1925 and March 17, 1927 inclusive, taxpayer paid $110,000 for $110,000 face value of Seabrook Co. 7-Year 6% Mortgage Bonds due December 1, 1931. The corporation was incorporated in New Jersey and was engaged in a farming and orcharding venture on a large scale. The name of the company was changed to Del Bay Farms, Inc. The corporation went into the hand of a Receiver in Equity and was liquidated. The holders of the Seabrook Co. 7-Year 6% Mortgage Bonds purchased the property covered by the mortgage, on foreclosure sale, and organized a new company, Del Bay Farms Incorporated, (a Delaware corporation) to carry on the business. In this reorganization taxpayer exchanged his $110,000 7-Year 6% Mortgage Bonds of the old company for 1100 shares of Preferred stock ($100 par value each) in the new company. The exchange was nontaxable. Taxpayer's 1100 shares preferred stock had, therefore, a cost basis of $110,000, the amount originally paid for the Seabrook Co. 7-Year 6% Mortgage Bonds.

The reorganized company, Del Bay Farms Incorporated (of Delaware) also proved unsuccessful. In 1929 the enterprise was wound up; its property sold; its activities ended, and its office was closed. A dividend in complete liquidation, amounting to $5 per share, was distributed to preferred stockholders. Taxpayer's portion of this dividend, amounting to $5,500, was received by him on May 9, 1929. At that time it was apparent that he had sustained a loss of $104,500 on the preferred stock, viz., the difference between $110,000, cost basis, and $5,500, liquidating dividend received. Taxpayer's return for the period from January 1st to September 21st, 1929, the day of his death, included this loss of $104,500 in item 15 "Losses by Fire, Storm, etc." among other deductions.

[fol. 19] Taxpayer did not surrender his stock certificates for cancellation at any time, and his Executors are still in possession of them.

II. The Issue: Respective Contentions, and Computations Based Thereon, of the Treasury Department and of Claimant Herein.

The issue is whether the said loss of $104,500 is a "capital" loss within the provision of Section 101 as main-

tained by the Treasury Department, or whether it is an ordinary loss deductible from gross income in arriving at net income, as asserted by claimant.

If the Treasury Department is correct in claiming said loss is a "capital loss," a "capital" net loss results, and the total tax liability for the taxable period is $27,546.63. Against this taxpayer's representatives have paid $15,036.89 in installments, pursuant to the return filed, and an alleged deficiency of $12,509.74 together with interest thereon from March 15, 1930, to December 19, 1931, in the sum of $1,321.75, or a total of $13,831.79, paid January 8, 1932. This constitutes payment in full.

If the claimant's contention is correct, and the said loss is an ordinary loss deductible in arriving at net income, the total tax liability for the taxable period is $15,565.58. Crediting against this $15,036.89 paid pursuant to the return filed, in instalments, leaves a balance of $528.69 in tax, with interest due thereon to date of payment. Claimant's further payment of $13,831.49 on January 8, 1932, was due to the extent of $528.69 tax, and interest thereon from March 15th, 1930, to December 19, 1931, in the amount [fol. 20] of $55.86; the balance of $13,246.94 was illegally collected and constitutes an overpayment, which, together with interest thereon as provided by law, should be refunded to claimant.

This claim is therefore in the amount of $13,246.94 with interest thereon as provided by law.

III. Reasons for Claimant's Contention That Loss of $104,500 on Del Bay Co. Preferred Stock Is An Ordinary Loss:

The claimant contends that under the provisions of the Act of 1928 the loss of $104,500 sustained by taxpayer on the preferred stock is deductible from gross income in arriving at net income subject to tax, and that it is not a "capital" loss under Section 101, for the following reasons:

---

* As herein used, the word "capital" (in quotation marks) refers to the restrictive meaning under Section 101 of the 1928 Act, *e. g.*, "capital" gain, "capital" loss, etc., whereas the word capital (without quotation marks) refers to the ordinary bookkeeping or accounting meaning, *e. g.*, capital transactions.

A. Section 23(e) of the 1928 Act gives taxpayer in unequivocal terms the right to deduct uncompensated losses in determining net income subject to tax. To abridge this right, equally unequivocal words must be found.

B. Section 101, on the facts stated, does not curtail taxpayer's right to deduct his loss under Section 23(e) because there was not here either a sale or exchange.

Section 101(b) describes the person subject to its "capital" net loss provisions as a

*"taxpayer who * * * sustains a capital net loss (as hereinafter defined in this section) * * *"*

The definition of "capital" loss contained in Section 101(c) is

"* * * deductible loss resulting from the *sale or exchange*"

[fol. 21] of "capital" assets, and the excess of such losses over similar gains constitutes a "capital" net loss.

The parenthetical words of the first quotation are new in the 1928 Act. Their obvious meaning is to limit definitions to those contained in Section 101, and they should be given that effect. For that reason "sale or exchange" cannot properly be given other than the ordinary meaning of these words, even though differently defined elsewhere in the Act.

There was in this case no sale or exchange in fact. There was not even a colorable sale or exchange of stock upon liquidation because taxpayer did not surrender his certificates. Section 101(b) can therefore have no application to this case, and taxpayer's right to the deduction under Section 23(e) remains unabridged.

C. It is claimed that Section 115(c) makes the receipt of a dividend in final liquidation a "sale or exchange" within the meaning of Section 101, and therefore Section 101(b) applies with consequent curtailment of taxpayer's right to deduct his loss under Section 23(e). This is not the case for three reasons.

(1) The words of Section 101(b) defining persons subject to that section reject definitions made elsewhere in the Act (see Section 101(b) and Point III B supra).

(2) Section 115(c) does not constitute a "definition" of sale or exchange. The words used are not those of a defini-

tion, but prescribe similarity of treatment only while recognizing that in fact there is no sale or exchange involved:

[fol. 22] "* * * shall be treated as" * * * (though) * * * "in full payment in exchange for the stock."

These words the Department has construed as a "definition" and "for all purposes of the Act," although there is nothing in them, or in their history, to justify such construction (See infra (3)).

(3) Section 115(c) does not purport to abridge the right given by Section 23(e) and its history and words show conclusively a different intention.

(a) It does not purport to limit deduction of losses under Section 23(e). It provides:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock. * * *"

Prima facie this has no bearing on the deduction of uncompensated losses; it gives a method of computing gain or loss and is the one used by taxpayer in this case.

(b) Its history shows the intention was to secure normal tax and surtax on gains derived from liquidation.

Prior to amendment of the 1918 Act (by Section 201(c)) confusion existed as to treatment of liquidating dividends, the Treasury Department distinguishing them from ordinary dividends and subjecting gain therefrom to both normal and surtax, while the Board of Tax Appeals exempted them from normal tax like ordinary dividends.

McCahan v. McCaughan, 59 Fed. (2nd) 3;
Eric A. Pearson v. Commissioner, 16 B. T. A. 1405.

[fol. 25] The Supreme Court decision of Hellmich v. Hellman, 276 U. S. 233 (published as T. D. 4217 VII-2 C. B. p. 238) settled the confusion by holding them subject to both normal and surtax, as was the gain from any capital transaction such as a sale.

Klein Federal Income Taxation, 1929 Edit. Sec. 10:18 (b) pp. 255-256.

It was thought desirable to incorporate this distinction in the statute itself, whence the amendment by a provision

which became Section 115(c) of the 1928 Act. Analogy to a sale or exchange, the most familiar of capital transactions, was the natural method of bringing the idea home to taxpayers.

D. The provisions of Article 625 Treasury Department Regulations 74, insofar as they may, by implication, be construed to compel taxpayer to take his loss upon final liquidation as a "capital" loss where there is in fact no sale or exchange, are in conflict with Section 23(e) and Section 101 of the 1928 Act, and are void. The question of the validity of this article insofar as it permits a taxpayer, optionally, to take gain received upon a final liquidation as "capital" gain, presents an issue not only irrelevant to this claim, but turning upon entirely different considerations.

E. Claimant's interpretation of these sections is in accordance with the accepted canons of statutory construction, which require effect to be given each of the Sections 23(e), 115(c), and 101, and that the result shall be harmonious and in accord with the legislative intent.

[fol. 24] The construction claimed is briefly:

(1) That under Section 23(e) taxpayer may deduct uncompensated losses in computing net income, unless equally specific words in other parts of the Act require different treatment;

(2) That under Section 115(c) the receipt of a dividend in final liquidation is to be treated as a capital (without quotation marks) transaction (i. e. subject to both normal tax and surtax) like a sale; but that receipt of a liquidating dividend is not thereby made ipso facto and for all purposes of the Act a sale or exchange if not in fact such;

(3) That under Section 101 and for the purposes of Section 101 a loss sustained by taxpayer must be treated as a "capital" loss only when it results from a sale or exchange in fact.

On the other hand, the construction which the Department seeks to enforce does not give effect to each of such sections, and causes conflict between them. This construction, as claimant understands it, is briefly:

(1) That Section 115(c) operates to make every receipt of a final liquidating dividend, ipso facto and regardless

of fact, a sale or exchange for all purposes of the Act, although it is not so worded.

(2) That such fictitious sale or exchange may then be imported into Section 101 for the purpose of compelling the taxpayer to establish a "capital" net loss, in spite of the fact that Section 101 by its terms applies only to "capital" net losses,

"* * * *as defined in this section.*"

[fol. 25] (3) No effect is given to the general provision of Section 23 (e) that uncompensated losses may be deducted in computing net income—a controlling provision only to be overcome by equally definite words in other parts of the Act.

Furthermore the Treasury Department's interpretation makes a harsh and inequitable distinction between situations which are essentially the same. To show this, take two hypothetical cases: Suppose this taxpayer (1) had received no liquidating dividend at all; compute his tax and compare it with that payable under the Treasury Department's rule if (2) he had received one cent per share in liquidation.

In the first case he has an ordinary loss of $110,000, deductible in computing net income (Mont S. Echols v. Commissioner, C. C. A. 8th reported in Prentice-Hall Federal Tax Service 1932 Par. 1726), and must pay a tax of $14,300.58. In the second case, although he has received only $11 return on his investment of $110,000, his loss of $109,989 is held a "capital" loss, and the tax resulting is in the amount of $26,860.50!

It does not appear that the difference of $11 in the actual situations supposed, is sufficient to justify the great variance of $12,559.92 in tax payable. A construction tending to such inequitable results should not be adopted unless clearly prescribed by the words of the statute.

The construction sought by claimant, on the other hand, permits adjustment of the tax on the basis of the actual loss sustained; as against a tax of $14,300.58 in the case supposed where no liquidating dividends have been received, the tax would be $14,303.11 where one cent per share had been received in liquidation.

[fol. 26] Even if the words of the statute are ambiguous, which claimant denies, it is well recognized that they are to be construed most favorably to the taxpayer.

IV. This claim is submitted without prejudice to taxpayer's right to submit further evidence of fact, and incorporates by reference the relevant parts of protest filed May 14, 1931, in the U. S. Department of Internal Revenue, Second District of New York, the brief filed June 22, 1931 at the hearing on said protest in the Second District of New York, and the brief filed at the Office of the Commissioner of Internal Revenue, Washington, D. C., September 11, 1931, at the hearing granted on that date before Mr. Chapman.

Dated, New York, N. Y., December 13th, 1932.

Respectfully submitted, (Sgd.) Harold T. White, as Executor of the Estate of Alexander M. White, Deceased. (Sgd.) Alexander M. White, Jr., as Executor of the Estate of Alexander M. White, Deceased. (Sgd.) William I. Forthingham, as Executor of the Estate of Alexander M. White, Deceased.

Sworn to before me this 13th day of December, 1932. Rosa B. Crossman, Notary Public, Queens Co. Queens Co. Clk's. No. 365. N. Y. Co. Clk's. No. 424. Reg. No. 4C246. Comm. Expires March 30, 1934.

[fol. 27] EXHIBIT "H" TO PETITION

Treasury Department, Washington

May 9, 1933.

[Seal]

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:C:CC-4. CCP.

Mr. Harold T. White, Executor, Estate of Alexander M. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York

In Refund Claim for year 1/1-9/21/29—Amount $13,246.94

SIR:

In accordance with the provisions of section 3226, Revised Statutes, as amended, and as further amended by section

1103 of the Revenue Act of 1932, you are hereby notified that your claim for refund of taxes, referred to in Bureau letter of April 24, 1933, was disallowed on a schedule dated May 9 1933.

By direction of the Commissioner.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by T. F. Langley, Head of Division.

[fol. 28] EXHIBIT "I" TO PETITION

Treasury Department, Washington.

Apr. 24, 1933.

[Seal]

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:AR:A-2. ABB.

Mr. Harold T. White, Executor, Estate of Alexander M. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York

SIR:

Reference is made to your claim for refund in the amount of $13,246.94 income taxes of the above-named estate for the taxable year 1929.

Your claim is based upon the following issue:

Whether loss of $104,500.00 sustained upon preferred stock of Del-Bay Farms, Incorporated, is a capital loss within the meaning of section 101 of the Revenue Act of 1928, or whether it is an ordinary loss deductible from gross income.

It was previously held by this office following a conference on September 11, 1931, that the loss in question represents a capital net loss within the purview of existing regulations. Article 625 of Regulations 74 provides that any gain to a [fol. 29] shareholder on liquidation may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 of the Revenue Act of 1928. It follows that a transaction that would give rise to a capital net gain, if the amount received exceeded the cost,

would likewise give rise to a capital net loss, if the cost exceeded the amount received.

For the foregoing reasons, it is proposed to disallow your claim. Official notice of the disallowance will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

A copy of this letter is being forwarded to Mr. Harrison Lillibridge, 40 Wall Street, New York, New York, in accordance with the authority conferred upon him as evidenced by a power of attorney on file in this office.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by H. B. Robinson, Head of Division.

[fol. 30] II. General Traverse—Filed June 17, 1935

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

III. Substitution of Attorneys of Record

The petition in this case was filed by Cotton, Franklin, Wright & Gordon, as attorneys of record.

On March 23, 1937, on motion made therefor, and allowed by the court, Wright, Gordon, Zachry & Parlin, were substituted as attorneys of record without prejudice to any lien or interest of the former attorneys.

[fol. 31] In Court of Claims

No. 43002

Harold T. White, Sole Surviving Executor of the Estate of William A. White, Plaintiff,

against

The United States of America, Defendant

IV. Petition—Filed May 8, 1935

To the Honorable Judges of the Court of Claims of the United States:

The petition of Harold T. White, as and only as sole surviving Executor of the Estate of William A. White, de-

ceased, by Cotton, Franklin, Wright & Gordon, his attorneys, respectfully shows to this Court and alleges:

1. That William A. White died on May 6, 1927, a citizen of the United States and a resident of the City of New York, County of Kings, State of New York.

2. That on May 13, 1927, the Last Will and Testament of said William A. White, dated April 15, 1910, was duly admitted to probate by the Surrogate's Court of the State [fol. 32] of New York, Kings County, in Cause No. 3895, and letters testamentary thereon were issued by said Court to Harold T. White of Bedford, Westchester County, State of New York, and Alexander M. White of Oyster Bay, Nassau County, State of New York, a certificate of which order is attached hereto, marked Exhibit "A" and incorporated herein and that said Harold T. White and Alexander M. White duly qualified as Executors of the Estate of said decedent; that subsequent to their appointment as Executors Alexander M. White died on September 21, 1929; and that Harold T. White is now the sole surviving and acting Executor for said decedent.

3. That Harold T. White, as Executor, pursuant to the Revenue Act of 1928 and the Regulations in such cases made and provided, duly filed on or before March 15, 1930, a federal income tax return for the Estate of William A. White for the taxable and calendar year 1929, reporting net taxable income on which a tax of $3,541.11 was computed to be payable.

4. That Harold T. White, as Executor, caused to be paid by check to the Collector of Internal Revenue for the Second District of New York on account of the tax due on the return as filed for the calendar and taxable year 1929 an aggregate amount of $3,541.11 by making the following installment payments, to wit: $885.28 on March 15, 1930, $885.28 on June 14, 1930, $885.27 on September 15, 1930 and $885.28 on December 15, 1930; photostatic copies of the said [fol. 33] checks are attached hereto, marked Exhibits "B", "C", "D" and "E" and incorporated herein.

5. That on December 31, 1931. Harold T. White, as Executor, received from the Treasury Department, a Certificate of Overassessment, Number 1253113 (Schedule No. 44478) allowing a refund of $757.64 and interest thereon of

$43.53, together with a check drawn by the Disbursing Clerk of the Treasury Department for $801.17 on account of said overassessment or overpayment of income tax for the year 1929.

6. That on December 15, 1932, Harold T. White, as Executor, duly filed in detail and under oath according to the provisions of law in that regard and the Regulations of the Secretary of the Treasury established in pursuance thereof his written claim for refund of $446.06 with interest, or such greater amount as might be legally refundable, on Form 843, based on his right to deduct under Section 23(e) of the Revenue Act of 1928 a loss of $22,500 sustained on 500 shares of the Preferred Stock of Del Bay Farms, Incorporated, a full, true and correct copy of which claim is attached hereto, marked Exhibit "F" and incorporated herein.

7. That on May 9, 1933, the Commissioner of Internal Revenue by registered letter rejected said claim for refund, a true and correct copy of which letter is attached hereto marked Exhibit "G" and incorporated herein, for the reason, as set forth in the Treasury Department's letter dated April 24, 1933, a photostatic copy of which letter is [fol. 34] attached hereto, marked Exhibit "H" and incorporated herein, that said loss was a capital loss and therefore deductible under Section 101 of the Revenue Act of 1928.

8. That Harold T. White, as Executor, came into possession of, as part of the general residuary estate of William A. White, $50,000 face value 7-Year 6% Mortgage Bonds due December 1, 1931 of Seabrook Co., a corporation incorporated under the laws of the State of New Jersey; that on May 6, 1927, the date of William A. White's demise, said bonds had a true market value of $25,000; that the cost basis to the Executors of said bonds is $25,000; that the name of Seabrook Co. was changed to Del Bay Farms, Inc.; that thereafter in 1927 a receiver in equity was appointed for said Del Bay Farms, Inc. (in this paragraph sometimes referred to as the "old company") and said corporation was liquidated; that the holders of said 7-Year 6% Mortgage Bonds purchased at foreclosure sale the corporate properties pledged under the mortgage securing said 7-Year 6% Mortgage Bonds and organized under the laws of the

State of Delaware, Del Bay Farms, Incorporated (in this paragraph sometimes referred to as the "new company") to hold and operate the properties so purchased at foreclosure sale; that Harold T. White, as Executor, exchanged said 7-Year 6% Mortgage Bonds of the old company for 500 shares of Preferred Stock of $100 par value per share of the new company; that said exchange was a non-taxable exchange and the cost basis of the 500 shares of Preferred [fol. 35] Stock was $25,000; that the business of Del Bay Farms, Incorporated, the new company, proved unsuccessful; that during the year 1929 Del Bay Farms, Incorporated, the new company, sold its corporate properties, closed its office and ceased its activities; that in complete liquidation Del Bay Farms, Incorporated, the new company, paid a liquidating dividend of $5.00 per share on each share of its outstanding Preferred Stock; that on May 9, 1929 Harold T. White, as Executor, received his portion of said liquidating dividend amounting to $2,500; that the Estate of William A. White sustained a loss under Section 23(e) of the Revenue Act of 1928 of $22,500 on said 500 shares of Preferred Stock of Del Bay Farms, Incorporated, to wit, the difference between $25,000, the cost basis of said 500 shares of Preferred Stock to the Executors, and $2,500, the liquidating dividend received from Del Bay Farms, Incorporated, the new company.

9. That the Commissioner of Internal Revenue has denied petitioner's right to deduct, under Section 23 (e) of the Revenue Act of 1928, the loss of $22,500 referred to in paragraph 8 hereof, illegally claiming that said loss constitutes a capital loss deductible only to the extent and in the manner provided in Section 101 of the Revenue Act of 1928; that as a result of the Commissioner of Internal Revenue determining that said loss constitutes a capital loss a portion of the tax paid, to wit, $446.06, has been wrongfully, erroneously and illegally assessed and collected from the petitioner.

10. Petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the [fol. 36] United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government, and that he is the sole and absolute owner of the claim herewith presented; and that he has made no

transfer or assignment of said claim, or of any parts thereof, and that petitioner is justly entitled to the amounts claimed herein from the United States, after allowing all just credits and set-offs.

Wherefore petitioner prays judgment in his favor and against the United States of America for the sum of $446.06, with interest thereon at the rate of 6% per annum from the date of payment thereof, together with the costs of this action, and for such other relief as may to this Honorable Court seem just and proper.

Harold T. White, as Sole Surviving Executor of the Estate of William A. White. Cotton, Franklin, Wright & Gordon, Attorneys for Petitioner, Office & P. O. Address, 63 Wall Street, Borough of Manhattan, City of New York, N. Y. Charles C. Parlin, John P. Ohl, of Counsel.

[fol. 37] *Duly sworn to by Harold T. White. Jurat omitted in printing.*

[fol. 38] EXHIBIT "A" TO PETITION

No. 307629

The People of the State of New York to all to whom these presents shall come or may concern, send Greeting:

Know ye, That we, have inspected the records of our Surrogate's Court in and for the County of Kings, do find that on the 13th day of May, in the year One thousand nine hundred and twenty-seven by said Court, Letters Testamentary on the estate of William Augustus White, late of the County of Kings, deceased, were granted unto Alexander Moss White and Harold Tredway White the Executors named in the last Will and Testament of said deceased, and that it does not appear by said records that said letters have been revoked.

In Testimony Whereof, we have caused the Seal of the Surrogate's Court of the County of Kings to be hereunto affixed.

Witness, Honorable George Albert Wingate, Surrogate of our said County of Kings, at the Borough of Brooklyn, the 3rd day of May in the year One thousand nine hundred and thirty-five.

Percy T. Stapleton, Clerk of the Surrogate's Court.

[fol. 39] EXHIBIT "B" TO PETITION

No. 29378

New York March 15 1930

First National Bank

Pay to the order of Collector of Internal Revenue 2nd District New York Eight hundred and eighty five 28/100 Dollars.

$885 28/100

310259

W. A. & A. M. White.

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Mar. 15 1930

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

2 B

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
85 Mar. 17 1930
Federal Reserve Bank of New York

Office of the Collector of
Internal Revenue
Mar. 15, 1930
Received
2nd District, N. Y.

[fol. 40] EXHIBIT "C" TO PETITION

No. 30067

New York June 14th 1930

14 172

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District, New York, Eight hundred eighty five & 28/100 Dollars.

$885 28/100

W. A. & A. M. White.

2 B

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Jun. 14 1930

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
89 Jun. 16 1930
Federal Reserve Bank of New York

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

Office of the Collector of
Internal Revenue
Jun. 14 1930
Received
2nd District, N. Y.

Paid
Jun. 16 1930
The First National Bank
of the City of New York

[fol. 41] EXHIBIT "D" TO PETITION

No. 30549

New York Sept. 15th 1930

15 189

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York Eight hundred eighty five & 27/100 Dollars.

$885 27/100

W. A. & A. M. White.

2 B

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Sep. 15 1930

Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
15 Sep. 16 1930
Federal Reserve Bank of New York

Frank K. Bowers
Collector of Internal Revenue
Custom House, N. Y. City

Paid
9.16.30
First National Bank

Office of the Collector of
Internal Revenue
Sep. 15 1930
Received
2nd District, N. Y.

[fol. 42] EXHIBIT "E" TO PETITION

No. 31156

New York Dec. 15th 1930

15 186

First National Bank

Pay to the order of Collector of Internal Revenue, 2nd District New York Eight hundred eighty five & 28/100 Dollars.

$885 28/100

W. A. & A. M. White.

2 B
Received Payment Thru the
New York Clearing House
Prior Endorsements Guaranteed
25 Dec. 16 1930
Federal Reserve Bank of New York

Pay to the order of
Federal Reserve Bank of N. Y.
Income Tax Account

This check is in payment of an obligation to the United States and must be paid at par.

No Protest
Dec. 1930

William Duggan
Acting Collector of Internal Revenue
Custom House, N. Y. City

Paid
12.16.30
First National Bank

Office of the Collector of
Internal Revenue
Dec. 15 1930
Received
2nd District, N. Y.

[fol. 43] Form 843

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June, 1930

EXHIBIT "F" TO PETITION

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the blank below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP

(Date received)

× REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps HAROLD T. WHITE, Sole Surviving Executor under the Will of
[Business address]* WILLIAM A. WHITE, deceased
[Residence]* c/o W. A. & A. M. White, 40 Wall St. New York, N.Y.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Second District, New York.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1929, to December 31, 1929.
3. Character of assessment or tax INCOME TAX
4. Amount of assessment, $_____; dates of payment $3,541.11 paid 3/15/30; 6/15/30; 9/15/30; & 12/15/30. Refund of $757.64 & int. received 12/31/31.
5. [Date stamps were purchased from the Government]*
6. Amount to be refunded $446.06 and int.
7. Amount to be abated (not applicable to income or estate taxes) $.....
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1928, on December 15th, 1932.

*[Matter enclosed in brackets, struck out in copy.]

The deponent verily believes that this claim should be allowed for the following reasons:

[fol. 44] I. Statement of Facts.—Upon the death of William A. White on May 6, 1927, his Executors, of whom claimant is sole survivor, came into possession of $50,000 face value of 7-Year 6% Mortgage Bonds of the Seabrook Co., a corporation engaged in a farming and orcharding venture on a large scale, as part of the general residuary estate. The value of these bonds at the date of testator's death was fixed for Federal Estate Tax purposes at 50% of par, viz., $25,000, which constituted their cost basis in the hands of

the Executors. The name of the company had been changed to Del Bay Farms Inc. (a New Jersey corporation), and in 1927 it went into the hands of a Receiver in Equity and was liquidated. Holders of Seabrook Co. 7-Year 6% Mortgage Bonds purchased the property covered by the mortgage on foreclosure sale, and organized a new company, Del Bay Farms Incorporated (a Delaware corporation) to carry on the business. In this reorganization claimant-executor exchanged the $50,000 bonds of the old company for 500 shares of preferred stock in the new company. The exchange was nontaxable, and the preferred stock therefore had the same cost basis as the original holding at date of testator's death, viz., $25,000.

The reorganized company, Del Bay Farms Incorporated (of Delaware) also proved unsuccessful, and in 1929 the enterprise was wound up, its activities were ended, and its office was closed. A dividend in complete liquidation, amounting to $5 per share, was distributed to preferred stockholders; the common stockholders received nothing. Claimant-executor received the estate's portion of this dividend, amounting to $2,500, on May 9, 1929, two years and three days subsequent to the death of William A. White. No call was made upon the Executor for delivery of the stock certificates for cancellation, and they are still in his [fol. 45] possession. Upon payment of the dividend in complete liquidation, it was apparent that the estate had sustained a loss of $22,500, namely, the difference between $25,000, costs basis of the preferred stock and the $2,500 liquidating dividend received.

The issue here involved relates to the treatment to be accorded this loss under the Revenue Act of 1928.

II. The issue: respective contentions, and computations based thereon, of the Treasury Department and of claimant herein:

The issue is whether the said loss of $22,500 is a "capital" * loss within the provisions of Section 101 as main-

---

* As herein used, the word "capital" (in quotation marks) refers to the restrictive meaning under Section 101 of the 1928 Act, e. g., "capital" gain, "capital" loss, etc., whereas the word capital (without quotation marks) refers to the ordinary bookkeeping or accounting meaning, e. g., capital transactions.

tained by the Treasury Department, or whether it is an ordinary loss deductible from gross income in arriving at net income, as asserted by claimant.

If the Treasury Department is correct in claiming said loss is a "capital" loss, a "capital" net loss results, and the total tax liability for the taxable period is $2,783.47. The tax has been adjusted on this basis, so that if the Treasury Department's contention is correct, no further tax is due.

If claimant-executor's contention is correct, and the said loss is an ordinary loss deductible in arriving at net income, the total tax liability for the taxable period is $2,337.41, and a refund of $446.06, together with interest thereon as provided by law, is due and owing claimant-executor.

This claim is therefore in the amount of $446.06 with interest thereon as provided by law.

[fol. 46] III. Reasons for claimant's contention that loss of $22,500 on Del Bay Co. preferred stock is an ordinary loss:

The claimant-executor contends that under the provisions of the Act of 1928 the loss of $22,500 sustained by claimant-executor on the preferred stock is deductible from gross income in arriving at net income subject to tax, and that it is not a "capital" loss under Section 101, for the following reasons:

A. Section 23 (e) of the 1928 Act gives taxpayer in unequivocal terms the right to deduct uncompensated losses in determining net income subject to tax. To abridge this right, equally unequivocal words must be found.

B. Section 101, on the facts stated, does not curtail taxpayer's right to deduct his loss under Section 23 (e) because there was not here either a sale or exchange.

Section 101 (b) describes the person subject to its "capital" net loss provisions as a

"*taxpayer who* * * * *sustains a capital net loss* (*as hereinafter defined in this section*) * * *."

The definition of "capital" loss contained in Section 101 (c) is

"* * * deductible loss resulting from the *sale or exchange*"

of "capital" assets, and the excess of such losses over similar gains constitutes a "capital" net loss.

The parenthetical words of the first quotation are new in the 1928 Act. Their obvious meaning is to limit definitions to those contained in Section 101, and they should be [fol. 47] given that effect. For that reason "sale or exchange" cannot properly be given other than the ordinary meaning of these words, even though differently defined elsewhere in the Act.

There was in this case no sale or exchange in fact. There was not even a colorable exchange of stock upon liquidation because claimant-executor did not surrender his certificates. Section 101 (b) can therefore have no application to this case, and the right to the deduction under Section 23 (e) remains unabridged.

C. It is claimed that Section 115 (c) makes the receipt of a dividend in final liquidation a "sale or exchange" within the meaning of Section 101, and therefore Section 101 (b) applies, with consequent curtailment of taxpayer's right to deduct his loss under Section 23 (e). This is not the case for three reasons:

(1) The words of Section 101 (b) defining persons subject to that section reject definitions made elsewhere in the Act (see Section 101 (b) and Point III B, supra).

(2) Section 115 (c) does not constitute a "definition" of sale or exchange. The words used are not those of a definition, but prescribe similarity of treatment only while recognizing that in fact there is no sale or exchange involved:

"* * * shall be treated as" * * * (though) * * * "in full payment in exchange for the stock."

These words the Department has construed as a "definition" and "for all purposes of the Act," although there [fol. 48] is nothing in them, or in their history, to justify such construction. (See infra (3)).

(3) Section 115 (c) does not purport to abridge the right given by Section 23 (e) and its history and words show conclusively a different intention.

(a) It does not purport to limit deduction of losses under Section 23 (e). It provides:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock * * *."

Prima facie this has no bearing on the deduction of uncompensated losses; it gives a method of computing gain or loss and is the one used by taxpayer in this case.

(b) Its history shows the intention was to secure normal tax and surtax on gains derived from liquidation.

Prior to amendment of the 1918 Act (by Section 201 (c)) confusion existed as to treatment of liquidating dividends, the Treasury Department distinguishing them from ordinary dividends and subjecting gain therefrom to both normal and surtax, while the Board of Tax Appeals exempted them from normal tax like ordinary dividends.

McCahan v. McCaughan, 59 Fed. (2nd) 3;
Eric A. Pearson v. Commissioner, 16 B. T. A. 1405.

The Supreme Court decision of Hellmich v. Hellman, 276 U. S. 233 (published as T. D. 4217 VII-2 C. B. p. 238) settled [fol. 49] the confusion by holding them subject to both normal and surtax, as was the gain from any capital transaction such as a sale.

Klein Federal Income Taxation 1929 Edit. Sec. 10; 18 (b) pp. 255-256.

It was thought desirable to incorporate this distinction in the statute itself, whence the amendment by a provision which became Section 115 (c) of the 1928 Act. Analogy to a sale or exchange, the most familiar of capital transactions, was the natural method of bringing the idea home to taxpayers.

D. The provisions of Article 625 Treasury Department Regulations 74, insofar as they may, by implication, be construed to compel taxpayer to take his loss upon final liquidation as a "capital" loss where there is in fact no sale or exchange, are in conflict with Section 23 (e) and Section 101 of the 1928 Act, and are void. The question of the validity of this article insofar as it permits a taxpayer, optionally, to take gain received upon a final liquidation as "capital" gain, presents an issue not only irrelevant to this claim, but turning upon entirely different considerations.

E. Claimant-executor's interpretation of these sections is in accordance with the accepted canons of statutory construction, which require effect to be given each of the Sections 23 (e), 115 (c), and 101, and that the result shall be harmonious and in accord with the legislative intent.

The construction claimed is briefly:

(1) That under Section 23 (e) taxpayer may deduct uncompensated losses in computing net income, unless equally specific words in other parts of the Act require different [fol. 50] treatment;

(2) That under Section 115 (c) the receipt of a dividend in final liquidation is to be treated as a capital (without quotation marks) transaction (i. e. subject to both normal tax and surtax) like a sale; but that receipt of a liquidating dividend is not thereby made ipso facto and for all purposes of the Act a sale or exchange if not in fact such;

(3) That under Section 101 and for the purposes of Section 101 a loss sustained by taxpayer must be treated as a "capital" loss only when it results from a sale or exchange in fact.

On the other hand, the construction which the Department seeks to enforce does not give effect to each of such sections, and causes conflict between them. This construction, as claimant-executor understands it, is briefly:

(1) That Section 115(c) operates to make every receipt of a final liquidating dividend, ipso facto and regardless of fact, a sale or exchange for all purposes of the Act, although it is not so worded.

(2) That such fictitious sale or exchange may then be imported into Section 101 for the purpose of compelling the taxpayer to establish a "capital" net loss, in spite of the fact that Section 101 by its terms applies only to "capital" net losses

"* * * *as defined in this section.*"

[fol. 51] Furthermore the Treasury Department's interpretation makes a harsh and inequitable distinction between situations which are essentially the same. It is reasonable that a taxpayer who receives one cent per share in liquidation of his investment should reduce his loss correspond-

ingly as compared with a taxpayer who has received nothing in liquidation. This is the effect of the interpretation claimed by claimant-executor herein. But it is unreasonable that owing to a salvage of one cent per share, the whole balance of the loss should be changed in character into a "capital" loss, with its technical limitations and restrictions, unless the words of the statute specifically require it. Since there do not appear to be any words specifically requiring this construction except in the case of a sale or exchange, claimant-executor believes an equitable construction should be preferred.

Even if the words of the statute are ambiguous, which claimant-executor denies, it is well recognized that they are to be construed most favorably to the taxpayer.

IV. This claim is submitted without prejudice to taxpayer's right to submit further evidence of fact, and incorporates by reference the relevant parts of protest filed May 13, 1931, in the U. S. Department of Internal Revenue, Second District of New York, the brief filed June 4, 1931 at the hearing on said protest in the Second District of New York, and the brief filed at the Office of the Commissioner of Internal Revenue, Washington, D. C., September [fol. 52] 11, 1931, at the hearing granted on that date before Mr. Chapman.

Respectfully submitted, (Sgd.) Harold T. White, as Sole Surviving Executor of the Will of William A. White.

Dated New York, N. Y., December 13th, 1932.

Sworn to before me this 13th day of December, 1932. Rosa B. Crossman, Notary Public, Queens Co. Queens Co. Clks. No. 365. N. Y. Co. Clks. No. 424 Reg. No. 46246. Commission Expires March 30, 1934.

[fol. 53] EXHIBIT "G" TO PETITION

Treasury Department, Washington

[Seal] May 9, 1933

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:C:CC-4. CCP.

Mr. Harold T. White, Executor, u/w William A. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York.

In Refund Claim for year 1929—Amount $446.06

SIR:

In accordance with the provisions of section 3226, Revised Statutes, as amended, and as further amended by section 1103 of the Revenue Act of 1932, you are hereby notified that your claim for refund of taxes, referred to in Bureau letter of April 24, 1933, was disallowed on a schedule dated May 9, 1933.

By direction of the Commissioner.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by T. F. Langley, Head of Division.

[fol. 54] EXHIBIT "H" TO PETITION

Treasury Department, Washington

[Seal] April 24, 1933.

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:AR:A-2. ABB.

Mr. Harold T. White, Executor, u/w William A. White, Deceased, % W. A. and A. M. White, 40 Wall Street, New York, New York.

SIR:

Reference is made to your claim for refund in the amount of $446.06 income taxes of the above-named estate for the taxable year 1929.

Your claim is based upon the following issue:

Whether loss of $22,500.00 sustained upon preferred stock of Del-Bay Farms, Incorporated, is a capital loss within the meaning of section 101 of the Revenue Act of 1928, or whether it is an ordinary loss deductible from gross income.

It was previously held by this office following a conference on September 11, 1931, that the loss in question represents a capital net loss within the purview of existing regulations. [fol. 55] Article 625 of Regulations 74 provides that any gain to a shareholder on liquidation may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 of the Revenue Act of 1928. It follows that a transaction that would give rise to a capital net gain, if the mount received exceeded the cost, would likewise give rise to a capital net loss, if the cost exceeded the amount received.

For the foregoing reasons it is proposed to disallow your claim. Official notice of the disallowance will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

A copy of this letter is being forwarded to Mr. Harrison Lillibridge, 40 Wall Street, New York, New York, in accordance with the authority conferred upon him as evidenced by a power of attorney on file in this office.

Respectfully, W. T. Sherwood, Acting Deputy Commissioner, by H. B. Robinson, Head of Division.

[fol. 56] V. General Traverse—Filed June 17, 1935

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

VI. Substitution of Attorneys of Record

The petition in this case was filed by Cotton, Franklin, Wright & Gordon, as attorneys of record.

On March 23, 1937, on motion made therefor, and allowed by the court, Wright, Gordon, Zachry & Parlin, were sub-

stituted as attorneys of record without prejudice to any lien or interest of the former attorneys.

VII. Argument and Submission of Cases

On November 2, 1937, the above-named cases were argued and submitted together by Mr. John P. Ohl, for plaintiffs, and by Mr. Daniel F. Hickey, for defendant.

[fol. 57] VIII. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Green, J.**— Filed December 6, 1937

No. 43001

Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White,

v.

The United States

No. 43002

Harold T. White, Sole Surviving Executor of the Estate of William A. White

v.

The United States

Mr. John P. Ohl for plaintiffs. Mr. Charles C. Parlin and Wright, Gordon, Zachry & Parlin were on the briefs.

Mr. Daniel F. Hickey, with whom was Mr. Assistant Attorney General James W. Morris, for defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

These cases having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

1. These two cases have been consolidated for hearing and trial by agreement of counsel. The issues to be determined by the Court are identical in the two cases, the chief

of which is whether the loss for 1929 should be treated as an ordinary loss under section 23(e) of the Revenue Act of 1928 as claimed by plaintiff or as a capital loss under section 101 of the same act as claimed by defendant.

[fol. 58] No. 43001

2. Alexander M. White died on September 21, 1929. He was a resident and citizen of the State of New York. Up to the time of his death he was a member of the brokerage firm of W. A. and A. M. White, a partnership, 14 Wall Street, New York. W. A. White is the William A. White referred to in case No. 43002 and the father of Alexander M. White.

3. On November 11, 1929, the Last Will and Testament of Alexander M. White dated September 13, 1928, was admitted to probate by the Surrogate's Court of the State of New York, Nassau County, and letters testamentary thereon were issued by the Court to Harold T. White, Alexander M. White, Jr., and William I. Frothingham and they duly qualified as executors of the estate of Alexander M. White and are now acting in that capacity.

4. Harold T. White, as executor, on March 15, 1930, filed an income tax return for Alexander M. White, deceased, for the taxable period from January 1, 1929 to September 21, 1929 showing a net income of $96,354.65 and a tax thereon of $15,036.89.

5. The income tax of $15,036.89 was paid to the Collector of Internal Revenue for the Second District of New York as follows:

March 15, 1930	$3,759.23
June 14, 1930	3,759.22
September 15, 1930	3,759.22
December 15, 1930	3,759.22
Total	15,036.89

6. On October 7, 1931, the Commissioner of Internal Revenue notified the estate of Alexander M. White that a redetermination of the tax liability for the taxable period from January 1, 1929, to September 21, 1929, disclosed a deficiency in the income tax amounting to $12,509.74 which was assessed in due course. In redetermining the tax liability the Commissioner treated as capital net loss an item of

$104,500 deducted in the return as uncompensated loss. On January 8, 1932, the tax deficiency of $12,509.74 plus interest in the amount of $1,321.75, or a total of $13,831.49, was [fol. 59] paid to the Collector of Internal Revenue for the Second District of New York.

7. On December 15, 1932, the executors of the estate of Alexander M. White, deceased, filed a claim on form 843 with the Collector of Internal Revenue for the Second District of New York for the refund of $13,246.94 together with interest. This claim is based upon the alleged error by the Commissioner of Internal Revenue in treating as a capital net loss under Section 101 of the Revenue Act of 1928 an item of $104,500.00 deducted in the return as an uncompensated loss under Section 23 (e) of the same act.

8. On May 9, 1933, the Commissioner of Internal Revenue by registered mail notified the executors of the estate of Alexander M. White, deceased, that the claim for refund in the amount of $13,246.94 was disallowed. The reasons for the rejection of the claim are set forth in a letter from the Commissioner of Internal Revenue dated April 24, 1933, the pertinent parts thereof reading as follows:

Reference is made to your claim for refund in the amount of $13,246.94 income taxes of the above-named estate for the taxable year 1929.

Your claim is based upon the following issue:

Whether loss of $104,500.00 sustained upon preferred stock of Del-Bay Farms, Incorporated, is a capital loss within the meaning of section 101 of the Revenue Act of 1928, or whether it is an ordinary loss deductible from gross income.

It was previously held by this office following a conference on September 11, 1931, that the loss in question represents a capital net loss within the purview of existing regulations. Article 625 of Regulations 74 provides that any gain to a shareholder on liquidation may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 of the Revenue Act of 1928. It follows that a transaction that would give rise to a capital net gain, if the amount received exceed the cost, would likewise give rise to a capital net loss, if the cost exceeded the amount received.

For the foregoing reasons, it is proposed to disallow your claim. Official notice of the disallowance will be issued by

registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

[fol. 60] No. 43002

9. William A. White died on May 6, 1927. He was a resident and citizen of the State of New York.

10. On May 13, 1927, the last Will and Testament of William A. White dated April 15, 1910, was admitted to probate by the Surrogate's Court of the State of New York, Kings County, and letters testamentary thereon were issued by the Court to Harold T. White and Alexander M. White. The persons named duly qualified as executors of the estate of William A. White. Alexander M. White died on September 21, 1929, and Harold T. White is now the sole surviving and acting executor of this estate.

11. On March 15, 1930, Harold T. White as executor filed an income tax return for the estate of William A. White for the calendar year 1929 reporting a net income of $53,882.90 and tax thereon of $3,541.11.

12. The tax of $3,541.11 was paid to the Collector of Internal Revenue for the Second District of New York as follows:

March 15, 1930	$885.28
June 14, 1930	885.28
September 15, 1930	885.27
December 15, 1930	885.28
Total	3,541.11

13. On July 28, 1931, the Bureau of Internal Revenue notified Harold T. White, executor of the estate of William A. White, that a redetermination of the tax liability for the calendar year 1929 in connection with the revenue agent's report disclosed an overassessment of $757.64. The bureau's letter stated, however, that the office had sustained the revenue agent in his treatment of a loss of $22,500 on the stock of Del-Bay Farms, Incorporated. This loss was treated by the Commissioner of Internal Revenue as a capital net loss and not an uncompensated loss.

On December 31, 1931, a certificate of overassessment for 1929 was forwarded to the estate of William A. White together with a refund check of $801.17, being the overassessment of $757.64 together with interest thereon of $43.53.

14. On December 15, 1932, Harold T. White, as executor [fol. 61] of the estate of William A. White, filed a claim on form 843 for refund of $446.06 income tax paid for the calendar year 1929 together with interest thereon. This claim was based on the alleged error by the Commissioner of Internal Revenue in treating as a capital net loss under Section 101 of the Revenue Act of 1928 an item of $22,500 deducted in the return for 1929 as an uncompensated loss under Section 23 (e) of the same act.

15. On May 9, 1933, the Commissioner of Internal Revenue, by registered mail, notified the executor of the estate of William A. White, deceased, that the claim for refund in the amount of $446.06 had been disallowed. The reasons for the rejection of the claim are set forth in a letter from the Commissioner of Internal Revenue dated April 24, 1933. This letter, except for the amounts of tax and of loss involved, is the same as the letter set out in finding 8 herein.

Nos. 43001 and 43002

16. The Seabrook Company was incorporated under the laws of the State of New Jersey in July 1920. It operated a large agricultural and horticultural project near Bridgeton, New Jersey.

17. Alexander M. White became financially interested in the operation of the Seabrook Company and ultimately he, his relatives, and associates lost large amounts of money in the project. The business never was successful and it constantly labored under financial difficulties.

18. The Board of Directors of the Seabrook Company at a meeting held on January 26, 1925, voted to proceed with a plan of readjusting the debt of this corporation. Under this plan, which was eventually consummated, 7-year 6% mortgage bonds in the total amount of $450,000.00 were issued. Alexander M. White, between February 18, 1925, and March 17, 1927, paid $110,000 for $110,000 face amount of these bonds. During the same period William A. White paid $50,000 for $50,000 face amount of these bonds. In July 1925 the Seabrook Company's name was changed to Del-Bay Farms, Inc., hereinafter referred to as the New Jersey corporation. Alexander M. White, his relatives, and associates owned the entire issue of these bonds and

[fol. 62] more than a majority of the voting stock of the New Jersey corporation.

19. The fortunes of the New Jersey corporation continued to decline and a plan of reorganization was formulated, at the instigation of Alexander M. White, providing for the incorporation of a new Delaware company to continue the enterprise and to acquire all of the properties of the New Jersey corporation through judicial proceedings for 4,500 shares of the new Delaware company's preferred stock which was to be distributed to the holders of bonds of the New Jersey corporation at the rate of 10 shares per $1,000 bond. The bonds were to be deposited with the firm of W. A. and A. M. White for the purpose of enabling Alexander M. White to carry out the plan.

Pursuant to the plan of re-organization Del-Bay Farms, Incorporated, was incorporated under the laws of the State of Delaware for the purpose of acquiring the properties of the New Jersey corporation.

20. Proper judicial proceedings were instituted and consummated. The holders of all of the $450,000 principal amount of bonds of the New Jersey corporation deposited their bonds on or before June 23, 1927, with the firm of W. A. and A. M. White for the purpose of enabling Alexander M. White to carry out the plan of reorganization.

21. Pursuant to Court decree, all of the properties of the New Jersey corporation were sold at judicial sale on June 28, 1927, which sale was duly confirmed by the Court. All of the mortgaged assets were purchased by Alexander M. White pursuant to the plan heretofore referred to for $410,434.58 subject to certain underlying mortgages totaling $316,000. This bid was satisfied to the extent of $66,999.46 by cash which was applied to expenses taking precedence over the claims of the bondholders, and a small balance thereof going toward making a small distribution to unsecured claim holders. The balance of $343,435.12 of this bid was satisfied by crediting the bonds on their pro rata share of the proceeds of the sale, each $1,000 bond being stamped to indicate payment to the extent of $763.19. Alexander M. White assigned the bid and turned over the stamped bonds to the Delaware corporation and by deed of conveyance dated October 13, 1927, joined in by everyone [fol. 63] in interest and approved by the Court, the proper-

ties were transferred to the Delaware corporation. In consideration of the properties so acquired, the Delaware corporation issued 4,500 shares of its preferred stock and distributed them to the holders of the bonds of the New Jersey corporation at the rate of 10 shares for each $1,000 face amount of such bonds.

22. The unmortgaged assets consisting principally of growing crops were likewise bid in for $14,565.42 in cash and conveyed to the Delaware corporation. After paying expenses and making a small distribution to unsecured creditors, there was no equity for or distribution made to the stockholders of the New Jersey corporation.

There was also issued and distributed to the former holders of bonds of the New Jersey corporation five shares of common stock in the Delaware corporation for each $1,000 face amount of such bonds. Alexander M. White, his relatives, and associates held a majority of the common stock of the Delaware corporation. This stock turned out valueless before December 1928.

23. Alexander M. White received as his part of the distribution made pursuant to the plan of reorganization 1,100 shares of preferred stock of the Delaware corporation for his $110,000 face amount of bonds of the New Jersey corporation. The estate of William A. White received as its part 500 shares of preferred stock in the Delaware corporation for its $50,000 face amount of bonds of the New Jersey corporation.

24. In December 1928 the Delaware corporation, by order of its Board of Directors, entered into an executory contract to sell all of its assets, except its bank balance, and the sale was consummated in February 1929. The Delaware corporation was dissolved on April 11, 1929, its activities ended and its office closed. Following this, a liquidating dividend of $5.00 was paid on each share of preferred stock whereupon such stock became worthless. Alexander M. White received $5,500 on his 1,100 shares of preferred stock and the estate of William A. White received $2,500 on its 500 shares of preferred stock. The stock certificates were never surrendered or transferred and the executors of both estates are still in possession of such certificates.

[fol. 64] No. 43001

25. The difference between $110,000, the cost of the bonds of the New Jersey corporation to Alexander M. White, exchanged for the preferred stock of the Delaware corporation, and the $5,500 received as a liquidating dividend by him on the preferred stock of the Delaware corporation, is $104,500, the loss claimed to be sustained upon the preferred stock.

No. 43002

26. In its estate tax return for the calendar year 1927 the estate of William A. White gave in the value of the $50,000 face amount of the bonds of the New Jersey corporation at $25,000. This value was accepted by the Commissioner of Internal Revenue. The difference between $25,000 and $2,500 received by the estate of William A. White as a liquidating dividend on the preferred stock of the Delaware corporation is $22,500, the loss claimed to be sustained upon the preferred stock.

Conclusion of Law in No. 43001

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover, and it is therefore ordered that their petition be dismissed.

Judgment is rendered against the plaintiffs in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Conclusion of Law No. 43002

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that his petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this [fol. 65] case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

GREEN, Judge, delivered the opinion of the court:

The two suits above entitled are each brought upon claims for refund. In case No. 43001, the recovery of $13,246.94 with interest is asked; in case No. 43002, $446.06 with interest is sought to be recovered. In both cases the recovery is sought on the ground of alleged overpayments of income taxes. The suits are brought by the respective executors of Alexander M. White in No. 43001 and William A. White in No. 43002. Refund claims were duly filed by the testators. In No. 43001, the plaintiffs contend that the Commissioner of Internal Revenue erred in treating as a capital loss on the liquidation of preferred stock an item of $104,500, deducted as an ordinary and uncompensated loss in the income tax return for the year involved. The same contention is made by the executor of William A. White in No. 43002 with regard to a loss of $22,500 sustained on the same liquidation of preferred stock and deducted as an ordinary loss in the tax return. The issue in both cases is whether the action of the Commissioner was correct.

The findings show that sometime prior to March 18, 1927, Alexander M. White [No. 43001] acquired for cash bonds of the Seabrook Company of the face value of $110,000. This corporation operated a large agricultural and horticultural project in New Jersey. In 1925 its name was changed to Del-Bay Farms, Inc., which will hereinafter be referred to as the old or New Jersey corporation.

March 18, 1927, William A. White [No. 43002] also acquired for cash bonds of the same issue in the amount of $50,000 face value.

Alexander M. White, his family, relatives, and associates owned the entire issue of the corporation bonds and a majority of the voting stock of the New Jersey corporation.

The old corporation fell into financial difficulties which led to a plan for reorganization which involved the foreclosure of the bonds upon the property of the old corporation and the acquisition of its property by a new corporation through judicial proceedings. Acting in accordance with [fol. 66] this plan, Alexander M. White, for the bondholders, purchased the properties of the old corporation at a judicial sale made subject to certain prior mortgages. The bonds were applied on the purchase price to the extent of approximately $763.19 per $1,000 and stamped paid to that extent.

The remainder of the purchase price was paid by Alexander M. White who assigned his bid to the newly incorporated Del-Bay Farms, Incorporated, organized in conformity to his plan, and by deed dated October 13, 1927, in which he was joined by all parties in interest, there was conveyed to the new Delaware corporation title to the properties bought in by him at the foreclosure sale.

In consideration of the receipt of the mortgaged assets the new corporation issued preferred stock of which Alexander M. White received as his share of the distribution made to the former holders of mortgage bonds of the New Jersey corporation 1,100 shares. William A. White having deceased, his estate received from the distribution mentioned 500 shares of the preferred stock of the Delaware corporation. There was no equity for or distribution to the stockholders of the old New Jersey corporation.

We need not set out in detail all of the proceedings which are shown by the findings. It is sufficient to say that the parties agree that the new Delaware company sold all of its assets and paid a liquidating dividend of $5 on each share of the preferred stock which thereupon became worthless, resulting in the loss on the bonds of the New Jersey corporation acquired by Alexander M. White in the sum of $104,500 and a similar loss on the bonds acquired by William A. White of $22,500.

The case turns on the construction of sections 101 and 115 of the revenue act of 1928 as applied to capital gains and losses.

Subsections (a) and (b) of section 101, in determining the tax to be levied under (a) upon a capital net gain and under (b) in case of a capital net loss, provide that the tax shall be determined upon the capital net gain (or capital net loss) "as hereinafter defined in this section," and under "definitions" subdivision (c) (2) states that—

"Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

[fol. 67] It is argued on behalf of plaintiff in each of the cases now before us that there was no "sale or exchange of capital assets." In the ordinary sense of the terms there was not, but section 115 provides with reference to distributions by corporations in subdivision (c)—

(c) Distributions in liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated

as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock.

We think the two sections should be considered together, and when so construed we find that the statute first defines a capital net loss as resulting from the sale or exchange of capital assets, and later provides that amounts distributed in complete or partial liquidation shall be treated as made in exchange for the stock. The provisions of section 115 make a liquidating dividend have the same effect as a sale or exchange of property. This is the rule implied in Article 625 of Regulations 74 which plaintiffs contend is void but which under the view that we have stated above is valid. In this connection it will be noted that section 201(c) of the revenue acts of 1924 and 1926 is identical with section 115(c) of the act of 1928 with respect to the matters now being considered. Congress would seem to have approved the Commissioner's interpretation of the provisions of the 1924 and 1926 acts by reenacting them in the 1928 act.

A number of cases have been cited by counsel for plaintiff in support of their contention that there was no sale or exchange in either of the instant cases. We think, however, that nothing contained therein has any application except in the case of William C. Rands v. Commissioner, 34 B. T. A. 1107, but the decision therein has been overruled by the case of Mary S. Childs v. Commissioner, 35 B. T. A. 1125. The case last cited supports the application of the statute as we have construed it.

What we have said above makes it unnecessary to consider the other objections made by defendant to the claim [fol. 68] sued upon in No. 43002, and it follows that the petition in each of the cases under consideration must be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 69] IX. JUDGMENT IN No. 43001

At a Court of Claims held in the City of Washington on the 6th day of December, A. D., 1937, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiffs are not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiffs' petition be and the same is hereby dismissed.

X. Judgment in No. 43002

At a Court of Claims held in the City of Washington on the 6th day of December, A. D., 1937, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

XI. Proceedings After Entry of Judgment

On February 4, 1938, the plaintiffs filed motions for new trial in both cases.

On March 7, 1938, the court entered the following order on said motions:

Order.

It is Ordered this 7th day of March, 1938, that the plaintiffs' motions for new trial be and the same are overruled.

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File Nos. 42,581, 42,582. Court of Claims. Term No. 96. Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White, petitioners, vs. The United States. Term No. 97. Harold T. White, Sole Surviving Executor of the Estate of William A. White, petitioner, vs. The United States. Petition for writs of certiorari and exhibit thereto. Filed June 7, 1938. Term Nos. 96, O. T., 1938, 97, O. T., 1938.

[fol. 71] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 96

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 72] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 97

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 7 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JOHN P. OHL,
CHARLES C. PARLIN,
Counsel for Petitioners.

INDEX.

	Page
Petition	1
Nature of proceedings	2
Summary of facts	2
Reasons for granting the writs	3
Brief in support of petition	7
Jurisdiction	7
Questions presented	8
Specifications of error	8
Argument	9
1. The decision below is directly in conflict with the decision of the Ninth Circuit Court of Appeals in *Chester N. Weaver* v. *Commissioner*	9
2. The court below erroneously concluded in its opinion and judgment that section 115(c) which makes reference to 111 and 112 but not to 101 is nevertheless to be read as broadening the defined term used in section 101(b) which by specific direction is thereinafter defined in 101(c)	11
A. Sections 101 and 115 are mutually exclusive	11
B. The court below has ignored the second sentence of section 115(c)	12
C. Cross reference in section 115(c) to 111 and 112 adequate	13
D. Decision below leads to absurd consequences	13
3. The court below erred in holding that Congressional approval was expressed by the enactment of section 115(c) after interpretation by the Commissioner, since no part of Regulations 74, Article 625, makes reference to capital losses and since section 101(b) was amended so as to negative such construction	15
A. No reference to losses	15
B. Congressional approval of regulations by changes in 1928 Act	15
4. The court below erred in construing section 115(c) as the result reached is contrary to the history and the purpose of the section	17
5. The court below erred in not following as controlling in these causes the decision of this Court in *Burnet* v. *Harmel*, 287 U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets"	19
A. Ordinary meaning required	19
B. Doubt to be resolved in favor of petitioners	20

Page

6. The judgment rendered below is contrary to the provisions of section 23(e), the court below erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections 21
A. Opinion ignores section 23(e) 21
B. If relevant section should be considered 21
C. Relationship between sections 23 and 101 established 21
Conclusion 22
Appendix A—Applicable statutes and regulations 23
Appendix B—*Chester N. Weaver* v. *Commissioner*, unreported opinion 28

TABLE OF CASES CITED.

Anderson v. *P. W. Madsen Inv. Co.* (C. C. A. 10th), 72 F. (2d) 768, 770 11
Botany Mills v. *United States*, 278 U. S. 282, 289 11
Burnet v. *Harmel*, 287 U. S. 103 4, 8, 9, 19, 20
Chester N. Weaver Company v. *Commissioner* (C. C. A. 9th), decided June 2, 1938 (as yet unreported but reproduced Appendix B) 4, 9, 14
Echols v. *Commissioner* (C. C. A. 8th), 61 F. (2d) 191 14
Eisner v. *Macomber*, 252 U. S. 189 17
Hamilton v. *Rathbone*, 175 U. S. 414, 419 13
Hellmich v. *Hellman*, 276 U. S. 233 19, 20, 21
Helvering v. *Bliss*, 293 U. S. 144 22
Helvering v. *N. Y. Trust Co.*, 292 U. S. 455 13, 14
Kohlsaat v. *Murphy*, 96 U. S. 153, 159-160 21
Lynch v. *Turrish*, 247 U. S. 221 17
Martin v. *Commissioner* (C. C. A. 2d), 61 F. (2d) 942, 944 11
McFeely v. *Commissioner*, 296 U. S. 102 11, 14, 16, 18, 20
Morse v. *United States*, 270 U. S. 151, 153 8
Old Colony R. Co. v. *Commissioner*, 284 U. S. 552, 561 20
Paso Robles Mercantile Co. v. *Commissioner* (C. C. A. 9th), 33 F. (2d) 653, 654, cert. denied 280 U. S. 595 11
Thompson v. *United States*, 246 U. S. 547, 551 13
United States v. *Seminole Nation*, 299 U. S. 417, 421 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Supreme Court of the United States:

The petition of Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White, in cause No. 96 and the petition of Harold T. White, as Sole Surviving Executor of the

Estate of William A. White, in cause No. 97 respectfully shows to this Honorable Court:

I. These are petitions for writs of certiorari to the Court of Claims to review decisions made and entered in that court on December 6, 1937 (R. 47, 48). The opinion of the Court of Claims (R. 45) is reported in 21 Fed. Supp. 361. On February 4, 1938, petitioners filed motions for new trials in both causes which were overruled by an order entered March 7, 1938 (R. 48).

II. These causes originated by actions commenced in the Court of Claims against the United States to recover overpayments of Federal income tax for the year 1929 by the Estate of William A. White and for the period January 1 to September 21, 1929 (the final income tax return period), of Alexander M. White, deceased. Both cases are governed by the provisions of the Revenue Act of 1928 and Treasury Regulations 74 relating thereto. The issues raised are identical and the causes have been consolidated in the certified transcript of the record.

III. The question presented is whether admitted losses of $22,500 and $104,500 realized by the petitioners in 1929 on their Preferred Stock of Del-Bay Farms, Incorporated, a Delaware corporation, as the result of the complete liquidation of the said corporation in that year, are deductible to their full extent, or only to the extent of 12½% thereof.

IV. The facts, briefly summarized, are that in 1929 Alexander M. White owned 1,100 shares of the Preferred Stock of Del-Bay Farms, Incorporated, a Delaware corporation, which he had acquired at a cost of $110,000, and that the Estate of William A. White held 500 shares of said Preferred Stock which had been valued at $25,000 in the decedent's estate tax return in 1927 (R. 44, 46). In February, 1929, Del-Bay Farms, Incorporated, sold all of its assets,

except its bank balances, and on April 11, 1929, was dissolved, its activities ended and its office closed (R. 43). Following this, a liquidating dividend of $5 was paid on each share of its Preferred Stock whereupon such stock became worthless (R. 43). Alexander M. White received $5,500 as a result of such distribution, thereby realizing a loss of $104,500, and the Estate of William A. White received $2,500, realizing a loss of $22,500 (R. 43, 46). The stock certificates were never surrendered or transferred and the Executors of the estates of both decedents are still in possession of such certificates (R. 43).

The petitioners deducted the above losses in full in their returns for the year 1929 (R. 38-39, 45). The Commissioner of Internal Revenue notified the petitioners that there were deficiencies in their income taxes for the above periods and these deficiencies were paid and claims for refund filed (R. 38, 39, 40, 41). The Commissioner rejected the petitioners' claims for refund whereupon these actions were commenced (R. 39-40, 41). The court below upheld the Commissioner and held that because of the payment by the Corporation of a small liquidating dividend, the losses realized by the petitioners on the Preferred Stock of Del-Bay Farms, Incorporated, were capital net losses deductible only to the limited extent of 12½% rather than ordinary losses deductible in full from gross income. The court conceded that, in the ordinary sense of the terms, there had not been a sale or exchange of capital assets. It held, however, that a "sale or exchange" comprehended a liquidation because of the provisions of Section 115(c).

V. The reasons for granting the writs are:

A. The decision of the Court of Claims treating losses resulting from a distribution in complete liquidation as losses from "sales or exchanges" is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth

Circuit in *Chester N. Weaver Company* v. *Commissioner*, decided June 2, 1938, as yet unreported, but set forth for convenience in Appendix B. This conflict as to the meaning of Section 115(c) should be resolved by this Honorable Court at this time.

B. The decision of the Court of Claims treating losses resulting from a distribution in complete liquidation as losses from "sales or exchanges" is directly contrary to the decision of this Court in *Burnet* v. *Harmel*, 287 U. S. 103, which held that only transactions which are *in fact* "sales or exchanges" in the usual and commonly understood meaning of such terms are within section 101.

C. The decision of the Court of Claims, in applying Section 115(c) (found in Supplement B relating to computation of net income), so as to enlarge the scope of section 101 (found in Supplement A relating only to Rates of Tax), raises a serious and important question of Federal law which should be definitely settled by this Honorable Court.

D. The number of corporate business failures entailing forced liquidations, together with the greatly increased number of voluntary dissolutions resulting from the current administrative policy of simplification of corporate structures makes the question of the correct treatment of liquidating distributions one of paramount importance. The result of the decision below, if left unchallenged, is to lead to the anomalous and ridiculous result that a small liquidating distribution in dissolution is more disadvantageous than no distribution at all.

WHEREFORE, for reasons stated more fully in the annexed brief, your petitioners pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims of the United States, com-

manding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in causes numbered and entitled docket No. 43001, Harold T. White, Alexander M. White, Jr. and William I. Frothingham, as Executors of the Estate of Alexander M. White *vs.* The United States, and No. 43002, Harold T. White, Sole Surviving Executor of the Estate of William A. White *vs.* The United States, to the end that the causes may be reviewed and determined in this Court, as provided in Title 28, Section 288 of the Code of Laws of the United States, and that the said final decrees of the said Court of Claims in the above entitled causes, and every part thereof, may be reviewed by this Court, and the determinations by the said Court of Claims, may be reversed and a mandate issued directing the relief prayed for in your petitioners' petitions in said Court of Claims; and your petitioners pray for such other and further relief as to this Court may seem just and proper; and your petitioners will ever pray.

Respectfully submitted,

JOHN P. OHL,
CHARLES C. PARLIN,
Counsel for Petitioners,
63 Wall Street,
New York, N. Y.

Dated, New York, N. Y., June 7, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE,

Petitioners;

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE,

Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims, including the court's Special Findings of Fact and Conclusions of Law, was filed December 6, 1937 (R. 37-47) and is reported in 21 Fed. Supp. 361.

Jurisdiction.

The judgments of the Court of Claims were entered on December 6, 1937 (R. 47, 48). On March 7, 1938, motions for

new trials in both cases filed February 4, 1938, were by a further order overruled (R. 48). The time to apply for writs of certiorari therefore runs from March 7, 1938.

The petitions for writs of certiorari were filed June 7, 1938. The jurisdiction of this Court is invoked under 28 U. S. C., §288 (b) and is timely under 28 U. S. C., §350. *Morse v. United States*, 270 U. S. 151, 153. *United States v. Seminole Nation*, 299 U. S. 417, 421.

Question Involved.

The question presented is whether Section 101 of the Revenue Act of 1928 is made applicable by Section 115 (c) to the admitted losses of $22,500 and $104,500 realized on Preferred Stock at the time of the liquidation of Del-Bay Farms, Incorporated, a Delaware corporation.

Specifications of Error.

1. The court erroneously concluded in its opinion and judgment that Section 115 (c) which makes reference to 111 and 112 but not to 101 is nevertheless to be read as broadening the defined term used in Section 101 (b) which by specific direction is thereinafter defined in 101 (c):

2. The court erred in holding that Congressional approval was expressed by the enactment of Section 115 (c) after interpretation by the Commissioner, since no part of Regulations 74, Article 625, makes reference to capital losses and since Section 101(b) was amended so as to negative such construction.

3. The court erred in construing section 115(c) as the result reached is contrary to the history and the purpose of the section.

4. The court erred in not following as controlling in these causes the decision of this Court in *Burnet* v. *Harmel*, 287

U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets."

5. The judgment rendered by the court is contrary to the provisions of Section 23(e), the court erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections.

Statute and Regulations Involved.

The relevant portions of the Revenue Act of 1928 and Regulations 74 are set forth in Appendix A.

ARGUMENT.

1. The decision below is directly in conflict with the decision of the Ninth Circuit Court of Appeals in Chester N. Weaver v. Commissioner.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit in *Chester N. Weaver* v. *Commissioner*, announced June 2, 1938 (as yet unreported but set forth for convenience in Appendix B), is directly in conflict with the cases at bar. The facts are almost identical. In the *Weaver* case, as in the instant cases, a final liquidating distribution was received by preferred stockholders after the corporation had sold all of its assets for cash and dissolved. In both cases the stockholders in reporting their income on their Federal tax returns claimed a full deduction for the amount of their loss. In both instances the Commissioner disallowed the full deduction, claiming that the loss was realized in connection with the "sale or exchange" of the stock. The applicable provisions of the Revenue Act were substantially identical in all material respects.*

* In the *Weaver* case the Preferred Stock was held less than two years and therefore governed by the provisions of Section 23(r) relating to securities "sold or exchanged" which were not capital assets under Section 101; whereas in the instant cases the Preferred Stock having been held

In the instant proceedings the Commissioner was upheld by the Court of Claims while, on the other hand, he was overruled by the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Weaver* case. The Court of Claims held that Section 115(c) made the phrase "sale or exchange" comprehend a distribution in liquidation. The contrary conclusion was reached by the Ninth Circuit in the *Weaver* case. The Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, held:

> "*Second.* By its terms § 23(r) (1) applies only to 'sales or exchanges'. We think the liquidating dividend here is neither, within the ordinary and accepted meaning of those terms. A 'sale or exchange' implies, we think, that each party to the transaction shall obtain something. We do not believe that the Townsend company received anything. There is no inconsistency with the application of § 115(c), because it does not say a liquidating distribution *is* an 'exchange', but says it 'shall be *treated*' as such for the purpose of applying §§111 and 112. It does not say that a liquidating distribution shall be treated as an 'exchange' for the purpose of §23(r) (1)." (Italics the Court's.)

This is directly contrary to the holding of the Court of Claims below after referring to sections 101 and 115(c) (R. 47):

> "We think the two sections should be *considered together*, and when so construed we find that the statute first defines a capital net loss as resulting from the *sale or exchange* of capital assets, and later provides that amounts distributed in complete or partial liquidation *shall be treated as made in exchange* for the stock. The provisions of section 115 make a liquidating dividend have the same effect as a *sale or exchange* of property." (Italics added.)

---

more than two years the asserted limitation is to be found in Section 101(b) relating to the "sale or exchange" of capital assets held more than two years. Section 23(r) was new in the 1932 Act.

2. The Court below erroneously concluded in its opinion and judgment that Section 115(c) which makes reference to 111 and 112 but not to 101 is nevertheless to be read as broadening the defined term used in Section 101(b) which by specific direction is thereinafter defined in 101(c).

A. *Sections 101 and 115 Are Mutually Exclusive.*

Sections 101 and 115 should not be construed together. They are mutually exclusive. Section 101 deals only with "sales or exchanges as hereinafter defined in this section." The maxim *expressio unis est exclusio alterius* is clearly applicable.

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

as was held in *Botany Mills* v. *United States*, 278 U. S. 282, 289; *Paso Robles Mercantile Co.* v. *Commissioner* (C. C. A. 9th), 33 F. (2d) 653, 654, cert. denied 280 U. S. 595; *Anderson* v. *P. W. Madsen Inv. Co.* (C. C. A. 10th), 72 F. (2d) 768, 770; *Martin* v. *Commissioner* (C. C. A. 2d), 61 F. (2d) 942, 944.

The court in *McFeely* v. *Commissioner*, 296 U. S. 102, has held that Sections 101(c) (8) and 113(a) (5) are mutually exclusive and that "each section should be read as affecting the subject to which alone it applies." Fully as good reason appears for likewise concluding that Sections 101 and 115 are mutually exclusive. Section 115(c) refers directly to section 111 which in turn makes reference to Section 113. Under the statutory scheme Section 115 like 113 has no relationship to Section 101 found in Supplement A entitled "Rates of Tax" and stated to be "Supplementary to Subtitle B, Part I" relating to "Rates of Tax".

B. *The Court Below Has Ignored the Second Sentence of Section 115(c).*

The second sentence of section 115(c) was omitted from the portion of Section 115(c) quoted in the opinion below. The disregarded second sentence directs:

> "The gain or loss to the distributee resulting from such exchange shall be *determined under section 111*, but shall be *recognized only* to the extent provided in section 112." (Italics added.)

The use of the phrase "*such* exchange" can only have been intended to invite attention to the same idea in the preceding sentence—". . . *treated as* in full payment in *exchange* for the stock." Again, as to section 115(c) the maxim *expressio unis est exclusio alterius* is applicable.

The omitted second sentence in 115 (c) in a clear unequivocal direction states that the "*determination*" is to be under Section 111 *not* 101. Moreover it is directed that the loss shall be "*recognized*" for tax purposes "*only*" to the extent provided in Section 112* *not* 101.**

It is respectfully suggested that the court below has by judicial legislation made the sentence read:

> "The gain or loss to the distributee resulting from such exchange shall be determined under sections 111 *and* 101, but shall be recognized only to the extent provided in sections 112 *or* 101, *whichever produces the greater tax.*"

The court cannot enact a law under the pretense of construing one. As was said in *Heiner* v. *Donnan*, 285 U. S. 312, 331:

> "For this court to do so would be to enact a law under the pretense of construing one and thus pronounce

* 100% recognized.
** 12½% recognized.

itself guilty of flagrant perversion of the judicial power."

C. *Cross Reference in Section 115 (c) to 111 and 112 Adequate.*

An application of Section 115(c) according to its literal meaning is possible, sensible and adequate. As to the treatment of amounts distributed in the complete liquidation of a corporation, Section 115(c) refers directly to Section 111. The terminology of Section 111 is:

> "*Except as hereinafter provided in this section,* the gain from the sale or *other disposition* of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the *loss shall be the excess of such basis over the amount realized.*" (Italics added.)

The reference to Section 111 in Section 115(c) allows the full quantum of the loss. The direct cross reference in 115(c) and the introductory phrase in 111 shows an intent to *exclude* Section 101 from consideration as to the percentage of deductibility recognizable. Literally both 115(c) and 101 are mutually exclusive. Both can be given their literal meaning and produce entirely sensible results. If the language be plain there is nothing to construe. *Hamilton* v. *Rathbone,* 175 U. S. 414, 419; *Thompson* v. *United States,* 246 U. S. 547, 551; see also Mr. Justice Roberts' dissenting opinion, Justices Brandeis and Stone concurring, in *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455, at 471:

> "Nothing could involve more dangerous consequences, than that the courts should rewrite plain provisions of a tax act in order to bring them into harmony with a supposed general policy."

D. *Decision Below Leads to Absurd Consequences.*

The construction by the court below does violence to the literal meaning of Sections 23(e), 101, 111 and 115(c) and

produces the entirely unreasonable result that the receipt of 1¢ per share, or a total of only $11, would make the tax $12,559.92 greater than if nothing had been received. On the literal construction of the Sections contended for by the petitioners herein and recently approved by the Ninth Circuit, the receipt of 1¢ per share would make an increase in tax of only $2.53 over the tax computed if nothing were received, an amount commensurate with the additional income. Such additional tax then becomes comparable to the amount payable if there had been no distribution at all, the stock having been entirely worthless. *Mont S. Echols* v. *Commissioner*, 61 F. (2d) 191 (C. C. A. 8th).

It is significant that this Court has previously in construing Section 101 placed emphasis on the dollar difference in tax under opposing constructions in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at 467, and footnote 4. Occasion was there taken to call attention to the fact that under the construction contended for by the Government the tax would be $252,667.66, whereas the tax under the taxpayer's contention would be $58,921.51. The conclusion was in favor of the taxpayer, the reason being given:

> "It is to be inferred that Congress did not intend penalization of that sort."

The same thought was again expressed in *McFeely* v. *Commissioner*, 296 U. S. 102, 111, and by the Circuit Court of Appeals for the Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, Appendix B.

Congress declared in Section 115(c) that reference should be made to 111. Congress said Section 111 excludes, in determining losses, Section 101. Congress has limited Section 101(b) to capital losses as therein expressly defined in 101(c). Notwithstanding, the court below has reached the surprising conclusion that Section 115(c) broadens the carefully limited scope of 101 without making reference thereto and thereby imposes a further qualification on the

determination of amount of loss under Section 111 in spite of the expressed language in 111 to the contrary.

3. The court below erred in holding that Congressional approval was expressed by the enactment of Section 115(c) after interpretation by the Commissioner, since no part of Regulations 74, Article 625, makes reference to capital losses and since Section 101(b) was amended so as to negative such construction.

A. *No References to Losses.*

The opinion below (R. 47) makes references to Article 625 of Regulations 74 as containing an administrative implication that Section 115 makes "a liquidating dividend have the same effect as a sale or exchange of property." The relevant part of Article 625 referred to states:

> "Any *gain* to the shareholder may, at *his option,* be taxed as a capital net *gain* in the manner and subject to the conditions prescribed in section 101 and articles 501-503." (Italics added.)

It will be noticed first that nowhere in the Article is there any reference whatsoever as to what happens in the event of a *loss.* An absence of administrative interpretation apropos of the question for decision furnishes a novel hypothesis upon which to base a conclusion of implied Congressional approval through subsequent enactments.

Why this omission in the Regulations to make the same references as to *losses?* It is natural in view of the fact that Sections 23(e) and 111 as well as Section 101(b) deals with losses.

B. *Congressional Disapproval of Regulations by Changes in 1928 Act.*

The opinion below concludes (R. 47):

> "Congress would seem to have approved the *Commissioner's interpretation* of the provisions of the 1924

and 1926 acts by *reenacting* them in the 1928 act." (Italics added.)

Even assuming *arguendo* that the Commissioner's Regulations had any interpretation apropos of the treatment of losses, Congress in the 1928 Act rather then *reenacting* the Section in *haec verba* removed all doubt upon the question by *amending* the provisions of the earlier 1926 and 1924 Acts. Article 1545 of Regulations 65 and 69 contained a cross reference (limited to *gains*) to Section 208 of the 1924 and 1926 Acts. But this cross reference was disapproved in the 1928 Act—not by adding language to Section 115 (as it was not needed there since as contended herein and as recently held by the Ninth Circuit that section serves an entirely different purpose and is self sufficient) but by an addition to section 101 itself.

Revenue Act of 1928.	*Revenue Act of 1926.*
In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (*as hereinafter defined in this section*), there shall be levied, collected, and paid * * * "	In the case of any taxpayer (other than a corporation) who for any taxable year sustains a capital net loss, there shall be levied, collected, and paid * * * "

The phrase "(*as hereinafter defined in this section*)" was added for a purpose. It was added in both 101(a) and 101(b). It excludes definitions of "capital net loss", the phrase modified, other places in the Act. The clear intent of Congress should not be set aside by resort to a cross reference in Regulations under prior acts which have been disapproved and which do not even contain language literally covering the instant situation.

The rule announced by this Court in *McFeely* v. *Commissioner*, 296 U. S. 102, 111 applies:

"Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

4. The court below erred in construing Section 115(c) as the result reached is contrary to the history and the purpose of the section.

On June 3, 1918, this Court decided *Lynch* v. *Turrish*, 247 U. S. 221, involving a consideration of the treatment to be accorded a final liquidating distribution under the Revenue Act of 1913. The Government there sought to tax the difference between the cost of the stock and the amount distributed to the stockholders which this Court there held could not be done. This decision the Treasury Department regarded as revealing a serious loop-hole in the law. As the Revenue Act of 1918 was then in the course of preparation what became Section 201(c) of the Act was written into the bill. This provided that:

"Amounts distributed in the liquidation of a corporation *shall be treated as* payments in exchange for stock or shares, and *any gain or profit* realized thereby shall be taxed to the distributee *as other gains or profits.*" (Italics added.)

The Treasury Department and Congress were thinking only of insuring the collection of a tax upon any gain realized upon liquidations similar to those held not taxable in *Lynch* v. *Turrish*, 247 U. S. 221. As "income" meant " 'the *gain* derived from *capital*, labor or from both combined', provided it be understood to include *profit gained through a sale or conversion of capital assets*" (*Eisner* v. *Macomber*, 252 U. S. 189, 207), the analogy chosen was to tax the liquidating profit gained through conversion in the same manner as "other gains or profits" were already taxed under the Act.

Significant is the fact that at the time of the Revenue Act of 1918 there was no provision in the law comparable to Section 101 of the 1928 Act relating to capital gains and losses. Consequently, historically the special treatment accorded distributions in complete liquidation as in exchange for stock has no relation whatsoever to the later special treatment of capital gains and losses in Section 101. Therefore it would be unreasonable to construe the subsequently introduced Section 101 dealing with only sales or exchanges of capital assets as requiring a changed meaning for the already well understood provisions of Section 115(c), relating to another type of capital transaction. As was distinctly stated in *McFeely* v. *Commissioner*, 296 U. S. 102, 110, in construing section 101(c)(8) with Section 113 (a)(5):

> "The fact that the two sections deal with the same general subject—capital gains—is cited in support of the Commissioner's position that they ought to be consistently applied. There is, however, nothing novel in the naming of arbitrary 'basis' dates differing from the admitted dates of acquisition."

The reason for the enactment of section 201(c)* was simply to make it clear that Congress disapproved of the Treasury Department's treatment of distributions in liquidation as current yield or like ordinary dividends. Congress made it clear that it regarded the profit or loss realized upon the liquidation of a corporation *as capital in character* rather than current or periodic income. This is perfectly clear if subsection (a) of Section 115 be compared with (c).

A liquidating distribution contemplates the return of investment, the wiping out of the shareholder's interest in the corporation and may or may not involve the return of

* Comparable to Sec. 115(c) of Rev. Act of 1928.

profits. A distribution in liquidation is not current gain but *capital* gain and it was therefore decided that such gain should be taxed as such *other gains or profits* and not as the receipt of an ordinary dividend. The court has stated in *Hellmich* v. *Hellman*, 276 U. S. 233, at 237:

> "The gains realized by the stockholders from the distribution of the assets in liquidation were subject to the normal tax *in like manner as if* they had sold their stock to third persons." (Italics added.)

5. The court below erred in not following as controlling in these causes the decision of this Court in Burnet v. Harmel, 287 U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets."

A. *Ordinary Meaning Required.*

The opinion of the court below concedes that there was not in the ordinary sense of the terms a "sale or exchange". No other position is tenable. *Burnet* v. *Harmel*, 287 U. S. 103. The *Harmel* case presented the question whether profit derived from the granting of leases to oil or mineral properties construed under the state law to be a "sale in place" were profits from "sales or exchanges". Although property rights were sold for cash, this Court refused to expand the meaning of "sale or exchange" to comprehend a lease for the reason that, generally speaking (the State laws of a few States to the contrary notwithstanding), such leases "would not generally be described as a sale" of the mineral contents of the soil, using the term either in its technical or in its commonly understood sense. To hold the contrary, this Court declared, would have been to adopt a distorted rather than the common meaning of the term "sale". In the words of Mr. Justice Stone writing for the Court in the *Harmel* case, 287 U. S. 103, 108:

> "Congress legislated in the light of this history, cf. United States *v.* Merriam, 263 U. S. 179, 187; and, in the absence of explicit language indicating a different purpose, it cannot be taken to have intended that an oil and gas lease under the capital gains provisions, any more than a mineral lease under the earlier acts, should be treated like an ordinary sale of land or chattels, resulting in a conversion of capital assets. Such a construction would have disregarded legislative and judicial history of persuasive force; it would have adopted a distorted, rather than the common meaning of the term sale, see Old Colony R. Co. v. Commissioner, 284 U. S. 552, 561, and would have tended to defeat rather than further the purpose of the Act."

The mandate of *Burnet* v. *Harmel*, 287 U. S. 103, that the special treatment accorded by Section 101 is limited strictly to the common meaning of the terms employed, can lead but to one conclusion: *Hellmich* v. *Hellman*, 276 U. S. 233, holds that distribution in liquidation is not a sale but *only analogous* to a sale; *Burnet* v. *Harmel*, 287 U. S. 103, holds that merely an *analogy to a sale is not sufficient* to bring such analogy within the purview of the section.

B. *Doubt to Be Resolved in Favor of Petitioners.*

As was stated in *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, at 561:

> "If there were doubt as to the connotation of the term, or another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer. *Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Merriam*, 263 U. S. 179; *Bowers* v. *Lighterage Co.*, 273 U. S. 346; *United States* v. *Updike*, 281 U. S. 489; *Burnet* v. *Niagara Falls Brewing Co.*, 282 U. S. 648."

See also *McFeely* v. *Commissioner*, 296 U. S. 102, 111.

6. The judgment rendered below is contrary to the provisions of Section 23(e), the court below erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections.

A. *Opinion Ignores Section 23(e).*

Nowhere in the court's opinion below is there any reference whatsoever to Section 23(e) of the Revenue Act of 1928. This Section granting the petitioners a 100% deduction in unequivocal terms has been ignored, the court poising the construction problem as follows:

> "The case turns on the construction of sections 101 and 115 of the revenue act of 1928 as applied to capital gains and losses."

This is the more surprising since under the special findings of fact No. 1 submitted by petitioners, it is found:

> "* * * The issues to be determined by the Court are identical in the two cases, the chief of which is whether the loss for 1929 should be treated as an ordinary loss under section 23(e) of the Revenue Act of 1928 as claimed by plaintiff or as a capital loss under section 101 of the same Act as claimed by defendant."

B. *Every Relevant Section Should Be Considered.*

Petitioners are not advised by the opinion as to why Section 23(e) should not be considered; why the construction adopted should not at least attempt to harmonize all three provisions, Sections 23(e), 101(b), and 115(c). See *Hellmich* v. *Hellman*, 276 U. S. 233, 237; *Kohlsaat* v. *Murphy*, 96 U. S. 153, at 159-160.

C. *Relationship Between Sections 23 and 101 Established.*

The statutory relationship between one of the subdivisions of Section 23 and Section 101 has been the subject

of special consideration by this Court in *Helvering* v. *Bliss*, 293 U. S. 144, wherein it was unanimously held (p. 150):

> "By the express words of § 23(n) charitable contributions are to be deducted to ascertain net income as defined in § 21; and nothing in § 101, which prescribes merely a method for segregating a portion of that net income for taxation at a special rate, in any wise alters the right of the taxpayer to take the deduction in accordance with § 23(n)."

This Court also took special pains to point out (p. 151):

> "Nor should the reduction in the rate of tax on capital gain, first granted in the Revenue Act of 1921, be held to circumscribe the privilege granted in the earlier Acts, and retained in later ones, with respect to charitable contributions, unless that result be plainly required by the language used."

No reason can be found why subdivision (e) of Section 23 should not be accorded the same treatment as subdivision (n).

Conclusion.

The petition for writs of certiorari should be granted.

Respectfully submitted,

JOHN P. OHL,
CHARLES C. PARLIN,
Counsel for Petitioners,
63 Wall Street,
New York, N. Y.

June 7, 1938.

APPENDIX A.

Statutes and Regulations Involved.

REVENUE ACT OF 1928.

(Italics in text supplied.)

Subtitle B—General Provisions.

Part I—Rates of Tax.

* * * * * * *

Part II—Computation of Net Income.

"SEC. 21. *Net Income.*

'Net income' means the gross income computed under section 22, less the deductions allowed by section 23."

"SEC. 22. *Gross Income.*

(a) *General Definition.*—'Gross income' includes *gains, profits,* and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or *sales,* or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or *gains* or *profits* and income derived from any source whatever.

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(d) *Distributions by Corporations.*—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

(e) *Determination of Gain or Loss.*—In the case of a *sale or other disposition* of property, the gain or loss shall be computed as provided in sections 111, 112, and 113."

"SEC. 23. *Deductions from Gross Income.*

In computing net income there shall be allowed as deductions: * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—* * *

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or * * *

(g) *Basis for Determining Loss.*—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) * * *, shall be the same as is provided in section 113 for determining the gain or loss from the *sale or other disposition* of property."

Subtitle C—Supplemental Provisions.

Supplement A—Rates of Tax.

[Supplementary to Subtitle B, Part I.]

"SEC. 101. *Capital Net Gains and Losses.*

(a) *Tax in case of capital net gain.* * * *

(b) *Tax in case of capital net loss.*—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a *capital net loss* (*as hereinafter defined in this section*), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title—* * *

(2) 'Capital loss' means deductible loss resulting from the *sale or exchange* of capital assets.

(3) 'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets *sold or exchanged* during the taxable year.

* * * * * * *

(6) *'Capital net loss'* means the excess of the sum of the *capital losses* plus the capital deductions over the total amount of capital gain.

(7) 'Ordinary net income' means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) 'Capital assets' means property held by the taxpayer *for more than two years* (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business."

Supplement B—Computation of Net Income.

[Supplementary to Subtitle B, Part II.]

"SEC. 111. *Determination of Amount of Gain or Loss.*

(a) *Computation of gain or loss.—Except as hereinafter provided in this section,* the gain from the *sale or other disposition* of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

(b) *Adjustment of basis.*—In computing the amount of gain or loss under subsection (a)—

(1) Proper adjustment shall be made *for any* expenditure, *receipt,* loss, or other item, *properly chargeable to capital account,* and * * *

(c) *Amount realized.*—The amount realized from the *sale or other disposition* of property shall be the sum of any

money received plus the fair market value of the *property (other than money)* received.

(d) *Recognition of gain or loss.*—In the case of a *sale or exchange*, the extent to which the gain or loss determined under this section shall be *recognized* for the purposes of this title, shall be determined under the provisions of section 112."

"SEC. 112. *Recognition of Gain or Loss.*

(a) *General rule.*—Upon the *sale or exchange* of property the entire amount of the gain or loss, determined under section 111, shall be *recognized, except as hereinafter provided in this section.* [None of the exceptions applicable] * * *"

"SEC. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the *sale or other disposition* of property acquired after February 28, 1913, shall be the cost of such property except * * *" [None of the exceptions applicable]

"SEC. 115. *Distributions by Corporations.*

(a) *Definition of dividend.*—The term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders, whether *in money or in other property*, out of its earnings or profits accumulated after February 28, 1913.

* * * * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation *shall be treated as in full payment in exchange for the stock,* * * *. The gain or loss to the distributee resulting from *such exchange* shall be *determined under section 111, but shall be recognized only to the extent provided in section 112.* * * *"

REGULATIONS 74.

"ART. 625. *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation are to be

treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation are to be treated as in part or full payment in exchange for the stock so canceled or redeemed. The phrase 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. A complete cancellation or redemption of a part of the corporate stock may be accomplished, for example, by the complete retirement of all the shares of a particular preference or series, or by taking up all the old shares of a particular preference or series and issuing new shares to replace a portion thereof, or by the complete retirement of any part of the stock, whether or not pro rata among the shareholders.

The gain or loss to a shareholder from a distribution in liquidation is to be determined, as provided in section 111 and article 561, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113 and articles 591-604; but the gain or loss will be recognized only to the extent provided in section 112 and articles 571-580. Any gain to the shareholder may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 and articles 501-503. In the case of amounts distributed in partial liquidation, other than a distribution in pursuance of a plan of reorganization as described in section 112(h), the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of section 115(b) for the purpose of determining the taxability of subsequent distributions by the corporation.

Example (1): A owns 10 shares of stock in the M Corporation for which he paid $1,250 in 1923. He receives in 1928 a dividend of $1,500 in complete liquidation. A is subject both to the normal tax and to the surtax upon his profit of $250 or at his option, in lieu of such taxes, to the tax upon capital net gain.

Example (2): A owns 10 shares of preferred stock and 10 shares of common stock in the M Corporation which he pur-

chased in 1918 for $1,100 and $1,000, respectively. In 1928 the M Corporation has on hand $225,000 of capital, earnings and profits of $25,000 accumulated prior to March 1, 1913, and earnings and profits of $125,000 accumulated after February 28, 1913. The preferred stock is retired at $125 per share, $125,000 being used by the corporation for this purpose. A receives $1,250 in exchange for his 10 shares of preferred stock and is therefore subject to the normal tax and the surtax on $150, or at his option, in lieu of such taxes, to the tax upon capital net gain. The M Corporation then distributes a cash dividend of $25,000 on the common stock, which is subject only to the surtax. Without any further accumulation of earnings and profits, the M Corporation thereafter liquidates completely. A receives $2,250 in exchange for his 10 shares of common stock and is therefore subject to the normal tax and the surtax on $1,250, or at his option, in lieu of such taxes, to the tax upon capital net gain."

APPENDIX B.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 8572.

CHESTER N. WEAVER COMPANY, a Corporation, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Jun. 2, 1938.

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Before Garrecht, Haney and Stephens, Circuit Judges.

Haney, Circuit Judge.

Review is sought of a decision of the Board of Tax Appeals which sustained a determination of respondent that there was a deficiency in the income tax paid by petitioner for the year 1933.

Petitioner, a California corporation, on August 9, 1932, purchased from Jeff R. Townsend Company, Inc., a California corporation, hereinafter referred to as the Townsend company, 1,000 shares of the latter's preferred stock, paying therefor $100 per share. The Townsend company's articles of incorporation provided that in the event of liquidation, its preferred stockholders would be entitled to receive a sum equal to 105 per cent of the par value of the preferred stock before any amount would be distributed to the holders of its common stock.

In 1933, the Townsend company became financially involved and unable to continue its business. On September 17, 1933, in order to dissolve and liquidate, it sold all its assets for $26,280.50, which on the next day was distributed pro rata to its preferred stockholders, who at the same time surrendered their certificates for preferred stock. Petitioner received a liquidating dividend in the sum of $13,140.25.

In its income tax return for the year 1933, petitioner claimed a deduction of $86,859.75 as a loss on such preferred stock, being the difference between the amount paid by petitioner for the stock, and the amount of the liquidating distribution. Respondent disallowed the deduction because "the loss sustained in connection with the stock is held to be from an exchange of stock held less than two years" and petitioner "had no gain from sales or exchanges of assets held less than two years". Respondent relied on § 23(r) of the Revenue Act of 1932 (47 Stat. 169).

On petition to redetermine the deficiency the Board sustained respondent, holding that "this disposition of the stock, under the provisions of the statute considered above, was a sale or exchange and the deduction of the losses sustained is barred by the provisions of section 23(r)(1)". Five members of the Board dissented. The instant petition to review the decision of the Board, entered pursuant to its holding, was then filed.

Section 21 of the act provides:

"'Net income' means the gross income computed under section 22, less the deductions allowed by section 23."

Section 22 provides in part:

"(a) 'Gross income' includes * * * income derived from * * * sales, or dealings in property * * *

"(d) Distributions by corporations shall be taxable to the shareholders as provided in section 115."

Section 23 provides in part:

"In computing net income there shall be allowed as deductions: * * *

"(f) Subject to the limitations provided in subsection (r) of this section, in the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise * * *

"(r) (1) Losses from sales or exchanges of stocks and bonds * * * which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges * * *"

Section 115 provides in part:

"(c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112 * * *"

We think that petitioner is entitled to the deduction by virtue of §§ 22(d), 115 (c) and 112. The amount received by petitioner was a liquidating dividend. Under § 22(d), that dividend is taxable as provided in § 115(c) Under the latter section, the gain or loss is to be computed under § 111 but the amount arrived at by the computation shall be recognized to the extent provided in § 112. Under § 112, the entire amount of the loss must be recognized.

Petitioner contends that the deduction is authorized by § 23(f), and argues that the limitation in § 23(r)(1) is not

applicable. Section 23(f) is a general statute relating to losses, whereas §§ 22(d), 115(c) and 112 are special with respect to the particular situation. Where there are two statutes, one being a general statute, and the other being a specific statute, and both cover the same subject matter, the specific statute should control. Therefore, we think § 23(f) should not be applied.

Respondent contends that § 23(r)(1) prohibits the deduction. It is asserted, as the Board held, that in effect there was an exchange of the stock for money. Petitioner argues, as the dissenting opinion of the Board members points out, that the legislative history of § 23(r)(1) was not intended to apply to such a situation as is present here. We think § 23(r)(1) is not applicable.

First. Section 23(r)(1) is broader and includes more transactions than §§ 22(d), and 115(c) and 112. As compared with those sections, it again is general. The specific statute should control rather than the general statute.

Second. By its terms § 23(r)(1) applies only to "sales or exchanges". We think the liquidating dividend here is neither, within the ordinary and accepted meaning of those terms. A "sale or exchange" implies, we think, that each party to the transaction shall obtain something. We do not believe that the Townsend company received anything. There is no inconsistency with the application of § 115(c), because it does not say a liquidating distribution *is* an "exchange", but says it "shall be *treated*" as such for the purpose of applying §§ 111 and 112. It does not say that a liquidating distribution shall be treated as an "exchange" for the purpose of § 23(r)(1).

Third. Had there been no liquidating dividend on the stock, petitioner could have deducted the entire loss. Reg. 77, Art. 174. (Same rule applies to bonds. Art. 194.) The rule announced by the Board leads to the conclusion that a holder of $100,000 of stock who gets a liquidating dividend of ten cents, cannot deduct his $99,999.90 loss. Such construction should be avoided, we think, on the authority of United States *v.* Katz, 271 U. S. 354, 357, where it is said:

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given it, consistent with the legislative purpose * * *"

Fourth. The most that can be said for respondent, is that it is doubtful whether §§ 22(d), 115(c) and 112, on the one hand, or § 23(r)(1) on the other hand is applicable. The rule announced in Gould *v.* Gould, 245 U. S. 152, 153, is applicable, we think, and is: "In case of doubt they [taxing statutes] are construed most strongly against the Government, and in favor of the citizen." Therefore, § 23(r)(1) should be construed as not applicable to petitioner.

We believe it is unimportant, whether the "deduction may be taken in the form of a minor or negative item of gross income", as mentioned by the Board, or whether it is taken as an outright deduction.

Decision reversed.

STEPHENS, *Circuit Judge, Dissenting:*

The Chester N. Weaver Company, the petitioner here, is a California corporation. Consolidated on review and dependent on the decision of this court upon this petition are petitions for review brought by Chester N. Weaver and Elsie S. Weaver.

On December 2, 1931, Mr. and Mrs. Weaver purchased 500 shares each of the six per cent cumulative preferred stock of the Jeff R. Townsend Company, hereinafter referred to as the Townsend Company, paying therefor $500 per share. On August 9, 1932, the Weaver Company acquired from the same corporation 1,000 shares of its preferred stock at the same price per share. The 2,000 shares of preferred stock so purchased constituted all of the preferred stock of the Townsend Company. The common stock belonged to other interests. The articles of incorporation provided that in the event of liquidation the holders of preferred stock should be entitled to receive therefor a sum equal to 105 per cent of the par value thereof before any amount should be distributed to the holders of the common stock.

Early in 1933 the Townsend Company became financially involved and unable to continue business. Its stockholders took the necessary steps to effect its dissolution and liquidation. On or about September 17, 1933, it sold all of its assets to the Weaver Company for $26,780.50. On September 18, 1933, the two Weavers and the Weaver Company, holders of all of the preferred stock of the Townsend Company, surrendered their stock certificates for cancellation and for the purpose of completing liquidation and effecting dissolution of that company. The $26,280.50 received for its assets was distributed in liquidation to the preferred stockholders pro rata. The Weaver Company received $13,140.25; Chester N. Weaver, $6,560.13, and Elsie S. Weaver, $6,570.12.

In their income tax returns for 1933 each of the stockholders deducted as a loss the difference between the amount paid for the preferred stock so surrendered and the amount received in liquidation, and, in determining the deficiencies herein, the Commissioner disallowed the deductions so claimed.

The Board of Tax Appeals held that the deductions were barred by Section 23(r) (1) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and approved the Commissioner's determination. Accordingly it decided that the deficiency due from the Weaver Company amounted to $4,323.48; that from Chester N. Weaver, $8,832.43; and that from Elsie N. Weaver, $2,447.84.

Section 23(r) (1) provides as follows:

"Losses from sales or exchanges of stocks and bonds [as defined in subsection (t) of this section] which are not capital assets [as defined in section 101] shall be allowed only to the extent of the gains from such sales or exchanges [including gains which may be derived by a taxpayer from the retirement of his own obligations]."

Since it is not claimed by the petitioner that the surrendered stock was a capital asset or that it has non-capital gains which might offset the loss here claimed, the only question presented is whether the petitioner's act of surrendering its stock in the Townsend Company and that company's act of

paving the petitioner $13,140.25 for the stock which was in complete liquidation of the company, constituted a sale or exchange of stock within the meaning of Section 23(r) (1). If it did the decision of the Board disallowing the claimed deduction was proper.

In order to decide the question before us it seems advisable to relate section 23(r) to other applicable sections in the framework of the Revenue Act. Sections 11, 12 and 13 of the Revenue Act of 1932 provide for a yearly tax upon the net income of every individual and every corporation. Section 21 provides that:

"'Net income' means the gross income computed under section 22, less the deductions allowed by section 23."

It is evident then, that in claiming the right to take a deduction it is necessary to show that it is authorized by section 23. New Colonial Co. *v.* Helvering, 292 U. S. 435, 440.

Among other allowable deductions enumerated in section 23 is that set out in subsection (f):

"Losses by Corporations.—Subject to the limitations provided in sub-section (r) of this section, in the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise."

It is under authority of this last-quoted subsection that petitioner claims the right to deduct the difference between the amount paid for the Townsend Company stock and the amount distributed to it as a stockholder on liquidation of that corporation.[1]

It is to be noted that section 23(f) is self-limited by section 23(r) [which has been quoted above]. The general effect of the two subsections when taken together is that a corporation may deduct all losses it sustains, provided, however, that if a loss results from a sale or exchange of stocks or bonds it may be deducted only to the extent that the corporation has gained from such sales or exchanges.

Petitioner's position is that it suffered a loss on the liquidation of the Townsend Company and that this loss did not

[1] Section 23(e) which applies to individuals, has the same effect, insofar as we are here concerned, as has 23(f) in the case of corporations.

result from a sale or exchange of stocks or bonds, and that consequently the whole amount thereof is deductible. One branch of petitioner's argument is founded on quotations from Congressional committee reports. It is asserted that these reports show that Congress did not intend to make liquidation distributions subject to the limitations of section 23(r). We do not think it is proper to resort to such sources since, as will be seen, the Act itself provides the solution to the problem without extraneous aid. Moreover, the reports relied on afford, at best, merely negative evidence of the Congressional intent. The fact that the reporting committees have nowhere specifically stated that distributions on liquidation were to be treated as exchanges within the meaning of section 23(r) is not persuasive that they intended to exclude such transactions from the operation of that section.

A second argument advanced by the taxpayer is that section 22 makes it clear that there is a distinction between a sale or exchange on one hand and a distribution in liquidation on the other. It is pointed out that subsection (d) of section 22 provides that:

"Distributions by corporations shall be taxable to the shareholders as provided in section 115."

while in the next subsection (e) it is provided that:

"In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113."

It is urged that the differentiation thus made in Section 22 between a corporate distribution and a "sale or other disposition of property" shows that a distribution on liquidation is not a "sale or exchange" within the meaning of section 23(r). We do not find this argument persuasive—in fact the provisions thus called to our attention are in the last result influential toward a conclusion opposite to that suggested by petitioner. That such is their effect, we think, becomes clear when section 115, [to which section 22(d) refers] is examined.

Section 115 [which is entitled "Distributions by Corporations" as is section 22(d)] defines the term "dividend"

in subsection (a); and in subsection (b) fixes the source of corporate distributions for the purposes of the Act. Subsection (c) provides in pertinent part:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112."

We believe that the phrasing of this section shows an intent to settle for tax purposes the somewhat anomalous character of a liquidation distribution transaction as a sale or exchange of the stock for the amount distributed. We think this interpretation is borne out when, as directed by section 115(c), reference is made to section 112, for that section is concerned only with the recognition of gain or loss upon "the sale or exchange of property"—if a distribution in liquidation is not fixed as a "sale or exchange" by section 115(c) the reference therein to section 112 would be without effect.

It is further significant to note that section 23(r) first appeared in the Revenue Act of 1932. The Revenue Act of 1928[2] contained subsections (d) and (e) of section 22 and subsection (c) of section 115 in form identical with that in which they appear in the 1932 act. Thus it appears that when subsection (r) of section 23 was enacted, distributions in liquidation had previously been impressed with the character of payments on sale or exchange. The reenactment without change of the sections characterizing liquidation distributions as exchanges, in the Act which first limited the deductibility of losses on stock sales or exchanges, is strongly indicative of the intention of Congress to include within the limitation provisions of section 23(r) such liquidation transactions.

[2] May 29, 1928, c. 852, §§ 22, 115, 45 Stat. 797, 822. Substantially identical provisions were also included in the Revenue Acts of 1918, 1924 and 1926.

In addition to petitioner's contentions so far discussed another argument, or an elaboration of that just disposed of, has been advanced. Ingenious though it may be we do not consider it sound. The elaboration is based upon the reference in section 22(d) to section 115, which section in turn refers to sections 111 and 112. The substance of this supplemental argument is: under the reference in 115(c) only subsection (c) of section 111 is applicable since that subsection alone deals with "exchanges", with which character 115(c) endows distributions in liquidation; that section 111(c) refers to section 112 for the recognition of loss in the case of an "exchange"; and that section 112(a) [the only portion of section 112 which is applicable] provides that upon an "exchange" the entire amount of the gain or loss is to be recognized. It is not clear whether petitioner advances the foregoing argument only to bolster the contention that the Revenue Act clearly recognizes a distinction between a "distribution in liquidation" and an "exchange" or whether petitioner is claiming that losses resulting to stockholders from corporate liquidations are to be given effect through section 22(d) without regard to the provisions of section 23. The latter interpretation was given the argument by the Board.

Since, as we see it, the statutory analysis upon which the argument proceeds is faulty it can be given no weight wherever it is intended to lead.

Section 111(c), claimed to be the sole provision of section 111 applicable under reference from section 115(c), does not fix the mode of *determination* of gain or loss [for which purpose 115(c) refers to 111] but merely refers to section 112 for the provisions governing *recognition* of the loss *determined* under other of its own provisions. Unless then we assume that the law-making body performed a useless act when it enacted in section 115(c) a reference to section 111, we are bound to give application to other portions of section 111 than subsection (c) thereof for 115(c) *itself* refers to section 112 for *recognition* of loss. Again, if petitioner's argument were to be accepted the result would be that though 115(c) distinguishes between "determination" and "recognition" of gain or loss by reference to sections 111 and 112 respectively, the net effect of the references

would be the "recognition" of a gain or loss nowhere "determined". Moreover, when section 111 is read as a whole, the expression "sale or other disposition of property" used in subsections (a) and (b) thereof is seen to have been intended to cover an "exchange" for subsection (c) thereof refers to section 112 only in those instances in which there has been a determination "under this section [section 111]" of the extent of gain or loss on "a sale or exchange." There could be no determination of loss on an "exchange" under section 111 unless the phrase "other disposition of property" contained in that section is inclusive of "exchange."

Moreover, if losses on liquidation distributions are to be governed by the provisions of section 22(d), 115(c), 111 and 112 without regard to section 23, logic would lead to the conclusion that section 23(r) is in *no* case to be given any effect. This is true because both in the case of a "distribution by a corporation" [22(d)] and in the case of a "sale or other disposition of property" [22(e)] the ultimate reference is to section 111 for "Determination," and to section 112 for "Recognition" of gain or loss. If the provision of section 112 to the effect that the entire amount of gain or loss (determined under section 111) shall be "recognized" means in the case of liquidation that such loss may be deducted independent of the provisions of section 23, the same result must follow in the case of a sale of stock. And if it does follow, then section 23(r) can be given no effect or operation. By the same token the references made in subsections (e) and (f) of section 23 to "the limitations provided in subsection (r)" would be purposeless, for the transactions limited by "subsection (r)" do not, under this view, come within the purview of 23(e) or (f).

I conclude that the separate provision in section 22 as to distributions by corporations on one hand and sales or other dispositions of property on the other hand does not make a distinction between a distribution in liquidation and a sale or exchange such as to prevent the application of section 23(r). On the contrary the ultimate effect of these provisions is to make it clear that such transactions are "exchanges" within the meaning of section 23(r) and therefore

subject to the limitations therein provided. The rule is long-established that the intention of the lawmaker is to be deduced from a view of every material part of a statute. Hellmich *v.* Hellman, 276 U. S. 233, 237. Congress having classified a transaction involving a distribution in liquidation as an exchange such classification requires it to be treated as coming within any provisions pertaining to exchanges.

It has previously been held that the provision of section 115(c) that amounts distributed in liquidation "shall be treated as in full payment in exchange for the stock" characterizes such transactions as "exchanges" for income tax purposes. In White *v.* U. S. (Ct. of Clms. 1937) 21 Fed. Supp. 361, it was held that an amount received by a holder of preferred shares on partial liquidation of a corporation was properly treated as a "capital" rather than an "ordinary" loss, the court stating that the provisions of section 115(c) "make a liquidating dividend have the same effect as a sale or exchange of property" and that consequently the distribution in question was a "deductible loss resulting from the sale or exchange of capital assets" within the meaning of section 101(c), (2). See also, Eckols *v.* Commissioner, (C. C. A. 8, 1932) 61 F. (2d) 191; Childs *v.* Commissioner, 35 B. T. A. 1125 (1937); Reg. 77, Art. 625.

The argument that section 23(r) is not here applicable because it is broader and includes more transactions than sections 22(d), 115(c) and 112 and consequently should not control the last named sections, has validity only if the so-called "specific" statutes are in conflict with the so-called "broader" statutes. The statutes are not in conflict unless it is thought that sections 22(d), 115(c) and 112 in and of themselves allow a loss deduction by way of a minus item of gross income. I have above suggested my reasons for thinking that they do not.

While it is true that the general rule is that acts levying taxes are, in case of doubt, to be construed in favor of the citizen, in my opinion the more specific rule applicable here is that deductions, like exemptions, are privileges, and a person claiming a deduction must point to an applicable statute and show that he comes within its terms. New Co-

lonial *v.* Helvering, 292 U. S. 435, and cases cited; see also, Paul & Mertons, Law of Federal Income Taxation, Vol. I, § 330 (1937 Cum. Supp.).

The suggestion that in a stated hypothetical case a harsh result will follow from the conclusion that a distribution in liquidation is an exchange within the intendment of section 23(r) is, I think, answered by the following quotation from Helvering *v.* Twin Bell Syndicate, 293 U. S. 312, 321:

"The respondent insists that, so applied, the sections may work unjust and unequal results, but it is to be remarked that this is likely to be so wherever a rule of thumb is applied without a detailed examination of the facts affecting each taxpayer. No doubt as the petitioner points out, equally illogical results might ensue from the application of the section, as the respondent construes it."

See also, Eckols *v.* Commissioner, *supra.*

I am of the opinion that the decision should be affirmed.

(Endorsed:) Opinion and dissenting opinion. Filed Jun. 2, 1938. Paul P. O'Brien, Clerk.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 29 1938
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., and WILLIAM I. FROTHINGHAM, as Executors of the Estate of Alexander M. White,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, Sole Surviving Executor of the Estate of William A. White,

Petitioner,

vs.

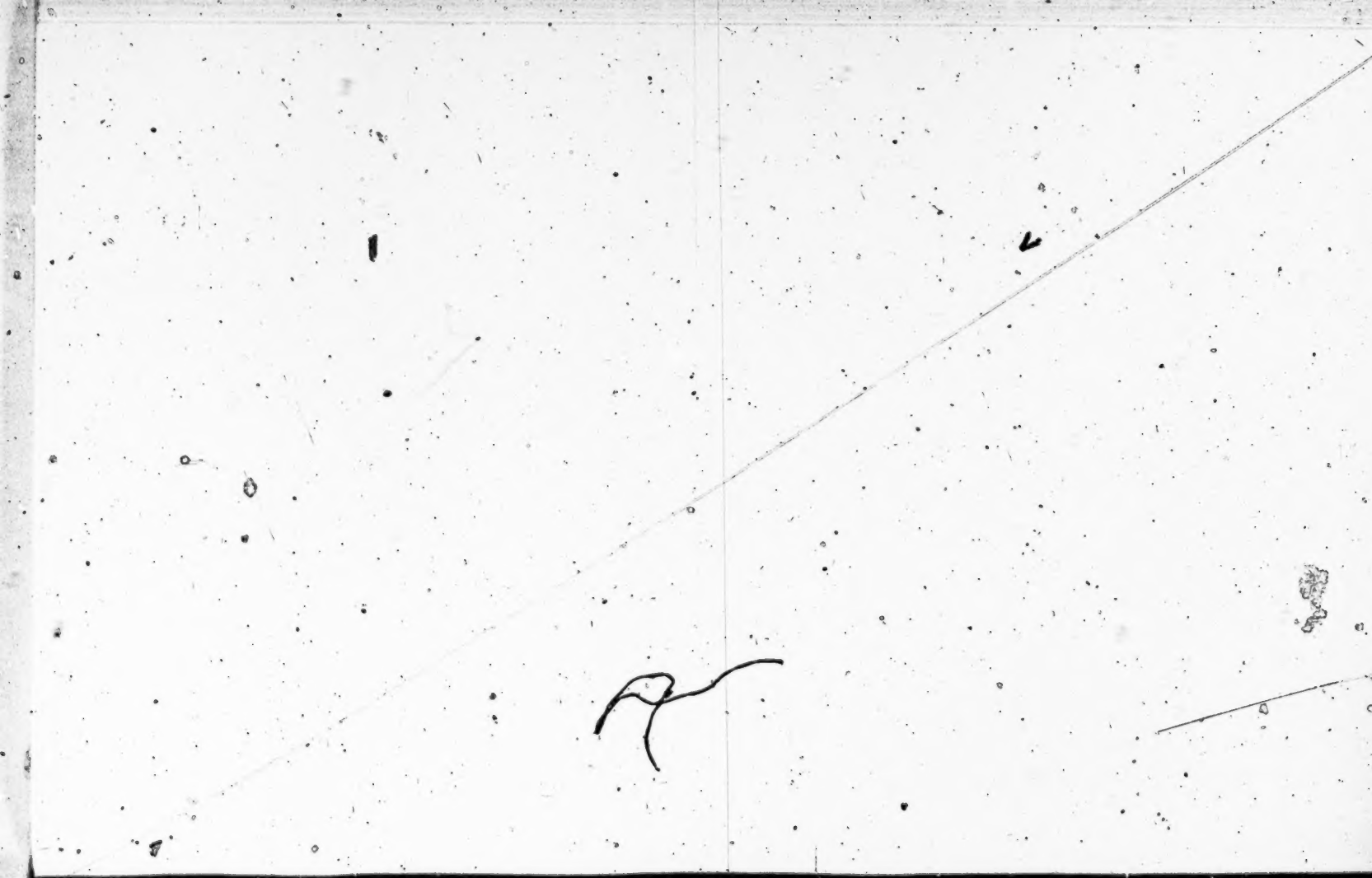
THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

JOHN P. OHL,
CHARLES C. PARLIN,
Counsel for Petitioners,
63 Wall Street,
New York, N. Y.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.



INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement	3
Statutes Involved	4
Specifications of Errors to Be Urged	7
Summary of Argument	8
Argument	9
I. The Court of Claims erred in not following as controlling in these causes the decision of this Court in *Burnet* v. *Harmel*, 287 U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets"	9
A. Section 101 Deals Only With "Sales or Exchanges"	9
B. Analogy to "Sales or Exchanges" Insufficient	10
II. The Court of Claims erroneously concluded in its opinion and judgment that section 115(c) which makes reference to 111 and 112 but not to 101 is, nevertheless, to be read as broadening the defined term used in section 101(b) which by specific direction is thereinafter defined in 101(c)	15
A. Sections 101 and 115 are Mutually Exclusive	15
B. The Court Below Has Ignored the Second Sentence of Section 115(c)	17

PAGE

C. Cross Reference in Section 115(c) to 111 and 112 Adequate 18

D. Doubt to Be Resolved in Favor of Petitioners 19

E. Decision Below Leads to Absurd Consequences 20

III. The Court of Claims erred in holding that Congressional approval was expressed by the enactment of section 115(c) after interpretation by the Commissioner, since no part of Regulations 74, Article 625, makes reference to capital losses and since section 101(b) was amended so as to negative such construction 22

A. No References to Losses 22

B. Congressional Disapproval of Regulations by Changes in 1928 Act .. 22

IV. The Court of Claims erred in construing section 115(c) as the result reached is contrary to the history and the purpose of the section 24

V. The judgment rendered below is contrary to the provisions of section 23(e), the Court of Claims erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections 28

A. Opinion Ignores Section 23(e) 28

B. Every Relevant Section Should Be Considered 29

C. Relationship Between Sections 23 and 101 Established 29

Conclusion 30

Citations.

Cases: PAGE

Anderson v. *P. W. Madsen Inv. Co.* (C. C. A. 10th), 72 F. (2d) 768, 770 16

Botany Mills v. *United States*, 278 U. S. 282, 289 16

Burnet v. *Harmel*, 287 U. S. 103 ..... 7, 9, 10, 11, 12

Echols v. *Commissioner* (C. C. A. 8th), 61 F. (2d) 191 20

Eisner v. *Macomber*, 252 U. S. 189 25

Hamilton v. *Rathbone*, 175 U. S. 414, 419 19

Heiner v. *Donnan*, 285 U. S. 312, 331 18

Hellmich v. *Hellman*, 276 U. S. 233 ..... 11, 27, 29

Helvering v. *Bliss*, 293 U. S. 144 29

Helvering v. *N. Y. Trust Co.*, 292 U. S. 455 ..... 19, 21

Helvering v. *Smith*, 90 F. (2d) 590 14

Kohlsaat v. *Murphy*, 96 U. S. 153, 159-160 29

Lynch v. *Hornby*, 247 U. S. 339 24

Lynch v. *Turrish*, 247 U. S. 221 ..... 24, 25

Martin v. *Commissioner* (C. C. A. 2d), 61 F. (2d) 942, 944 16

Mason v. *Pewabic Mining Co.*, 133 U. S. 50 15

McFeely v. *Commissioner*, 296 U. S. 102 ..... 16, 21, 23, 26

Old Colony R. Co. v. *Commissioner*, 284 U. S. 552, 561 19

Paso Robles Mercantile Co. v. *Commissioner* (C. C. A. 9th), 33 F. (2d) 653, 654, cert. denied 280 U. S. 595 16

Smith v. *Helvering*, *Commerce Clearing House, Inc., Board of Tax Appeals Service*, Decision No. 9405-G 14

Thompson v. *United States*, 246 U. S. 547, 551 19

Trustees of Dartmouth College v. *Woodward*, 4 Wheaton 518 13

PAGE

United States v. *Fairbanks*, 95 F. (2d) 794 12
United States v. *Katz*, 271 U. S. 354 21

Weaver, Chester N. Company v. *Commissioner* (C. C. A. 9th), 97 F. (2d) 31 ..... 2, 4, 8, 10, 19, 21

STATUTES:

Revenue Act of 1918, section 201 ..... 25, 27
Revenue Act of 1918, section 213(a) 25
Revenue Act of 1926, section 208(c) 23
Revenue Act of 1928, section 21 31
Revenue Act of 1928, section 22 31
Revenue Act of 1928, section 23(e) 4, 28, 29, 32
Revenue Act of 1928, section 23(f), (g) 33
Revenue Act of 1928, section 23(n) 29
Revenue Act of 1928, section 101 ..... 6, 9, 15, 22, 23, 29, 33
Revenue Act of 1928, section 111 ..... 18, 34
Revenue Act of 1928, section 112(a) 35
Revenue Act of 1928, section 112(g) 10, 35
Revenue Act of 1928, section 113(a) 36
Revenue Act of 1928, section 115(a) 36
Revenue Act of 1928, section 115(b) 36
Revenue Act of 1928, section 115(c) 5, 15, 17, 18, 22, 24, 36
Revenue Act of 1936, section 26(c) 13

MISCELLANEOUS:

Internal Revenue Bulletin, January 17, 1938—No. 3, p. 3 (I. T. 3152, 1938—3—9144) 13
Internal Revenue Bulletin, Cumulative Bulletin 1937—2, p. 111 (I. T. 3139, XVI—47—9049) 13
Regulations 45, Article 1548 25
Regulations 74, Article 625 ..... 22, 37
Report, Committee on Finance, No. 960, 70th Congress, 1st Session 32
Report, Committee on Ways and Means, No. 2, 70th Congress, 1st Session 16, 31

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., and WILLIAM I. FROTHINGHAM, as Executors of the Estate of Alexander M. White,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, Sole Surviving Executor of the Estate of William A. White,

Petitioner,

vs.

THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Claims of the United States is reported in 21 Fed. Supp. 361 (R. 37-47).

JURISDICTION

The judgments of the Court of Claims were entered on December 6, 1937 (R. 47, 48). Motions for new trials in both cases on the grounds that there were errors of law in the judgments rendered on December 6, 1937, as stated in the Specification of Errors herein, were by a further order of the Court of Claims overruled on March 7, 1938 (R. 48).

This Court on October 10, 1938 granted the petition for writs of certiorari, which had been applied for on June 7, 1938 pursuant to 28 U. S. C., section 288(d).

QUESTION PRESENTED*

Whether admitted losses of $104,500 and $22,500 realized by the petitioners in 1929 on their Preferred Stock of Del-Bay Farms, Incorporated, a Delaware corporation, as the result of the complete liquidation of the said corporation in that year, are deductible to their full extent, or only to the extent of 12½% thereof.

---

* Only the question stated was considered by the Court of Claims below and covered by the assignments of error herein. The conflict between the Court of Claims and the Circuit Court of Appeals for the Ninth Circuit, *Chester N. Weaver Co.* v. *Commissioner*, 97 F. (2d) 31, relates to the above question. The Government has, however, indicated in its Memorandum filed in response to petitioner's application for writs of certiorari that if certiorari was granted it would raise an additional defense in Docket No. 97, namely, that in the event of the reversal of the judgment of the Court of Claims in No. 97 no refund should be allowed in excess of $127.64 with interest thereon because of the bar of the statute of limitations, section 322 of the Revenue Act of 1928. If in the Government's answering brief it should seek to be heard upon this issue and the Court should be disposed, under the state of the record on this point, to consider such issue, the petitioner in Docket No. 97 is desirous of having the question of the sufficiency of its claim for refund for its full amount decided. In such event petitioner requests the privilege of filing a supplemental memorandum limited on such issue and will submit thereon without argument.

STATEMENT

In 1929 Alexander M. White owned 1,100 shares of the Preferred Stock of Del-Bay Farms, Incorporated, a Delaware corporation, which he had acquired at a cost of $110,000. The Estate of William A. White held 500 shares of said Preferred Stock which had been valued at $25,000 in the decedent's estate tax return in 1927 (R. 44, 46). In February, 1929, Del-Bay Farms, Incorporated, sold all of its assets, except its bank balances, and on April 11, 1929, was dissolved, its activities ended and its office closed (R. 43). Following this, a liquidating dividend of $5 was paid on each share of its Preferred Stock whereupon such stock became worthless (R. 43). Alexander M. White received $5,500 as a result of such distribution, thereby realizing a loss of $104,500, and the Estate of William A. White received $2,500, realizing a loss of $22,500 (R. 43, 46). Alexander M. White died on September 21, 1929 (R. 38). The stock certificates were never surrendered or transferred and the Executors of the estates of both decedents are still in possession of such certificates (R. 43).

The petitioners deducted the above losses in full in their returns for the year 1929 (R. 38-39, 45). The Commissioner of Internal Revenue notified the petitioners that there were deficiencies in their income taxes for the above periods and these deficiencies were paid and claims for refund filed (R. 38, 39, 40, 41). The Commissioner rejected the petitioners' claims for refund whereupon these actions were commenced in the Court of Claims (R. 39-40, 41).

The Court of Claims upheld the Commissioner concluding that, because of the payment by the Corporation of a small liquidating lividend, the losses realized by the petitioners on the Preferred Stock of Del-Bay Farms, Incorporated were capital net losses arising from a "sale or

exchange" deductible only to the limited extent of 12½%, rather than ordinary losses of capital investments deductible under section 23(e) in full from gross income. The Court of Claims conceded that, in the ordinary sense of the terms, there had not been a sale or exchange of capital assets. It held, however, that a "sale or exchange" comprehended a liquidation because of the provisions of section 115(c).

STATUTES INVOLVED

The relevant portions of the Revenue Act of 1928, c. 852, 45 Stat. 791, are, in view of the number and length of the sections involved, set forth in the Appendix.

Section 23(e).

Paraphrasing briefly the various sections involved, the Revenue Act of 1928 provides that petitioners' taxes are based upon "net income" computed at the rates provided in Subtitle B, Part I, of the Revenue Act of 1928. In turn, "net income" is computed under Part II, particularly section 21. Net income is there defined to mean "gross income computed under section 22, less the deductions allowed by section 23." Section 23(e) provides that in "computing net income there shall be allowed as deductions * * * losses sustained during the taxable year" not compensated for by insurance or otherwise "if incurred in any transaction entered into for profit."* Section 23(g) contains a

* Section 23(e) of the Revenue Acts of 1928 and 1932 deals with "Losses by individuals." The comparable section in such Acts dealing with "Losses by corporations" is 23(f). *Chester N. Weaver Co. v. Commissioner*, 97 F. (2d) 31, involves section 23(f) but dependent upon the Weaver Company decision are petitions for review filed from decisions of the Board of Tax Appeals in the cases of Chester N. Weaver and Elsie S. Weaver, individual taxpayers. Sections 23(e) and (f) are, it is believed, in so far as the present issue is concerned, comparable.

cross-reference to section 113 of Supplement B also dealing with the "Computation of Net Income" and which is stated to be "Supplementary to Subtitle B, Part II." Under such supplementary provisions in Supplement B, Part II, section 113, the cost basis for determining the amount of the deduction for losses sustained and to be allowed under section 23(e) is the cost of the property (in the instant cases $110,000 and $25,000, respectively). The amount of the loss deductible is the excess of the cost basis over the amount realized. The amounts realized from the sale or other disposition of the property here involved were $5,500 and $2,500, respectively. Consequently, the quantum of the losses allowable under section 23(e) is $104,500 and $22,500, respectively.

Section 115(c).

Section 115, found in the provisions "Supplementary to Subtitle B, Part II," provides that the "loss to the distributee resulting from" a complete liquidation of a corporation "shall be determined under section 111, but shall be recognized only to the extent provided in section 112."* Under section 111 the loss arising from the sale or other disposition of property is the excess of the basis provided for in section 113 over the amount realized. The amount realized from a sale or other disposition of property under section 111(c) is the sum of any money received plus the fair market value of the property other than money re-

* It is to be noted that section 22 "Gross Income" in subsections (d) and (e) makes specific direction to sections 115, 111, 112 and 113.

ceived. As the costs were $110,000 and $25,000 and the amounts realized were $5,500 and $2,500, the amounts of the losses were $104,500 and $22,500, respectively. The amount of the loss to be recognized is provided for in section 112, wherein it is stated that the entire amount of the gain or loss determined under section 111 shall be recognized except as thereinafter provided in said section. As applied to the instant cases none of the exceptions are applicable. Consequently, the entire amounts of $104,500 and $22,500 are recognized losses.

Section 101.

Section 101, found in provisions "Supplementary to Subtitle B, Part I," dealing with "Rates of Tax," has the effect of limiting a deductible loss resulting from the *"sale or exchange"* of capital assets to 12½% thereof. A "capital loss" is defined by section 101(c)(2) to mean deductible loss resulting from the *"sale or exchange"* of capital assets and section 101(c)(3) defines "Capital deductions" to mean "such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets *sold or exchanged* during the taxable year." The tax under the supplementary provisions in section 101(b) is computed upon *"capital net-loss (as hereinafter defined in this section)."* If, as petitioners contend, the loss suffered upon the Preferred Stock at the time of the complete liquidation of Del-Bay Farms, Incorporated was not a "sale or exchange", section 101 has no application to the instant cases.

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Court of Claims erred in not following as controlling in these causes the decision of this Court in *Burnet* v. *Harmel*, 287 U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets."

2. The Court of Claims erroneously concluded in its opinion and judgment that section 115(c) which makes reference to 111 and 112 but not to 101 is, nevertheless, to be read as broadening the defined term used in section 101(b) which by specific direction is thereinafter defined in 101(c).

3. The Court of Claims erred in holding that Congressional approval was expressed by the enactment of section 115(c) after interpretation by the Commissioner, since no part of Regulations 74, Article 625, makes reference to capital losses and since section 101(b) was amended so as to negative such construction.

4. The Court of Claims erred in construing section 115(c) as the result reached is contrary to the history and the purpose of the section.

5. The judgment rendered below is contrary to the provisions of section 23(e), the Court of Claims erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections.

SUMMARY OF ARGUMENT

Section 23(e) in unequivocal terms allows 100% of the losses realized upon petitioners' stock interest in Del-Bay Farms, Incorporated, at the time of its dissolution.

Equally unequivocal terms cannot be found disallowing to petitioners the full recognition or deductibility of any part of such losses. Section 115(c) literally and specifically directs the recognition of 100% of such losses. Assuming, *arguendo*, that section 115(c) is ambiguous, the doubt should be dissolved in favor of petitioners. Particularly as otherwise the receipt of a small final liquidating dividend leads to the anomalous result that the difference in tax may be many times the amount of the final liquidating dividend and that the receipt of nothing by the common stockholder makes him the preferred taxpayer.

Section 101 *per se* has no application to the question, as it deals only with "sales or exchanges." Both the Court of Claims in its opinion below and the Ninth Circuit in the *Weaver* case, although arriving at conflicting conclusions based upon the effect to be given section 115(c), concede that there was not in fact a "sale or exchange." No other conclusion, under the decisions of this Court, would have been tenable.

The argument proceeds under the separate errors specified.

ARGUMENT

I. The Court of Claims erred in not following as controlling in these causes the decision of this Court in *Burnet* v. *Harmel*, 287 U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets."

A. Section 101 Deals Only With "Sales or Exchanges".

Section 101 standing alone on the facts found does not curtail petitioners' right to the full deduction permitted under section 23(e) because section 101 deals only with the tax computation in cases where there has been a "sale or exchange." Moreover, the carefully limited scope of the section is clearly indicated by the care taken to define the terms used therein. It is provided in section 101(b) that:

> "In the case of any taxpayer, other than a corporation, who for any taxable year sustains a *capital net loss (as hereinafter defined in this section)* * * *"

and in section 101(c) that:

> "(2) 'Capital loss' means deductible loss resulting from the *sale or exchange* of capital assets."

The parenthetical words of the first quotation above are new in the Revenue Act of 1928. Their literal and obvious meaning is to restrict the scope of section 101 to the definitions contained in the section, and they should be given that effect. For the same reason the words, "sale or exchange", cannot properly be given other than their ordinary and accepted meaning, even though it be assumed *arguendo* that they are differently defined elsewhere in the

Act. Moreover, Congress' deliberate choice of the phrase "sale or exchange" in contradistinction to "sale or other disposition" used in other provisions of the same Act shows a restricted meaning was intended.

B. Analogy to "Sales or Exchanges" Insufficient.

There was in the instant cases no sale or exchange in fact. There was not even a colorable sale or exchange of the Preferred Stock upon the liquidation. All that happened was that petitioners received cash. They did not even surrender their preferred stock certificates.* The dollars received merely constituted the payment and satisfaction of their obligations under the corporate charter according to its terms—a division of their remaining corporate capital.

The opinion of the Court of Claims below conceded that there was not in the ordinary sense of the terms a "sale or exchange". No other position would have been tenable. *Burnet* v. *Harmel*, 287 U. S. 103. The *Harmel* case presented the question whether profits derived from the granting of leases to oil or mineral properties construed under the state law to be a "sale in place" were

---

* *Cf. Chester N. Weaver Co.* v. *Comissioner*, 97 F. (2d) 31, 32, where the preferred stockholders at the same time as the distribution surrendered their certificates. In Section 112(g) of the Revenue Act of 1928, Congress made a distinction in "reorganizations" based upon the absence of a surrender of the taxpayer's stock interest. It would seem that stock certificates were merely evidentiary. The dissolution of the corporation would appear to make the stock non-existent; thereafter the certificate would seem to be no more than an evidence of the right of participation in the division of the remaining corporate assets or capital. Since the negotiable character of the certificate and its readily salable value would be gone or very materially decreased, Congress had good reason for according a different treatment to gains or losses on liquidations than to gains or losses on sales or exchanges.

profits from "sales or exchanges". Although property rights were sold for cash, this Court refused to expand the meaning of "sale or exchange" to comprehend a lease for the reason that, generally speaking (the State laws of a few States to the contrary notwithstanding), such leases "would not generally be described as a sale" of the mineral contents of the soil, using the term either in its technical or in its commonly understood sense. To hold the contrary, this Court declared, would have been to adopt a distorted rather than the common meaning of the term "sale". In the words of Mr. Justice Stone writing for the Court:

> "Congress legislated in the light of this history, cf. *United States* v. *Merriam*, 263 U. S. 179, 187; and, in the absence of explicit language indicating a different purpose, it cannot be taken to have intended that an oil and gas lease under the capital gains provision, any more than a mineral lease under the earlier acts, should be treated like an ordinary sale of land or chattels, resulting in a conversion of capital assets. Such a construction would have disregarded legislative and judicial history of persuasive force; it would have adopted a distorted, rather than the common meaning of the term 'sale', see *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 561, and would have tended to defeat rather than further the purpose of the Act." [287 U. S. 103, 108.]

The mandate of *Burnet* v. *Harmel*, 287 U. S. 103, that the special treatment accorded by section 101 is limited strictly to the common meaning of the terms employed, can lead but to one conclusion. *Hellmich* v. *Hellman*, 276 U. S. 233, 237, holds that a distribution in liquidation is not a sale but *only analogous* to a sale: "The gains realized by the

stockholders from the distribution of the assets in liquidation were subject to the normal tax *in like manner as if* they had sold their stock to third persons." [Italics added.] *Burnet* v. *Harmel*, 287 U. S. 103, holds that a mere *analogy to a sale is not sufficient* to bring such analogy within the purview of section 101.

Likewise, it has been held that between the redemption of a bond and the sale or exchange thereof, there is a clear distinction, although the situations are analogous. *United States* v. *Fairbanks*, 95 F. (2d) 794. The government contended in this Court in opposing the taxpayers' petition for a writ of certiorari in the *Fairbanks* case:

> "The redemption and retirement of the bonds constituted neither a sale nor an exchange of capital assets, but payment, pursuant to call, of a fixed corporate obligation in accordance with its terms. The bonds on their face provided for their redemption at any time, at face value plus interest, upon notice to the registered holder thereof. The corporation so redeemed and thus extinguished its obligations.
>
> "None of the elements of a sale or exchange is present. There was no transfer of title; there was a mere payment of a debt, and return of the evidence of that debt. 'Sale' and 'exchange' connote a transfer of property to a new owner. Neither can be one-sided. There can be no sale without a purchase. There can be no exchange unless there be property parted with and property received by both parties. Certainly the corporation received no property for the cash it paid. The bonds it had issued were mere evidence of its obligation. *Commissioner* v. *Great Western P. Co.*, 79 F. (2d) 94, 96 (C. C. A. 2d), affirmed, 297 U. S. 543. Upon payment of the obligation, in accordance with its terms, that evidence was returned to the corporation."

Certiorari was denied in the *Fairbanks* case at this Term on October 10, 1938.

Petitioners' receipt of $5 per share on their Preferred Stock on the liquidation of the company certainly comes within the rationale of the government's position in the *Fairbanks* case. Under the constitutional provisions relating to impairment of obligations of contract, a corporate charter has long been held to be a contract. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheaton 518. The payment of $5 to the preferred stockholders of Del-Bay Farms, Incorporated on liquidation was as much a payment in accordance with fixed terms as the payment involved in the *Fairbanks* case.

The contractual nature of the preferred stockholders' rights is clearly revealed by recent rulings of the Bureau of Internal Revenue under section 26(c) of the Revenue Act of 1936 relating to "Contracts restricting the payment of dividends". It has been ruled that the provisions in preferred stock certificates to the effect that no dividends shall be paid on the common stock while any of the preferred stock remains outstanding or while indebtedness in excess of a certain amount existed, constituted a contract restricting the payment of dividends entitling the corporation to a certain credit allowed in such cases. Internal Revenue Bulletin, January 17, 1938—No. 3, p. 3 (I. T. 3152, 1938-3-9144): To the same effect, Internal Revenue Bulletin, Cumulative Bulletin 1937-2, p. 111 (I. T. 3139, XVI-47-9049):

> "Inasmuch as *the contract with the preferred shareholders* was executed by the corporation prior to May 1, 1936, and expressly deals with the payment of dividends, and inasmuch as the required

number of its preferred shareholders refused to consent to the payment of a dividend, in stock or otherwise, on the common stock, *such contract* operated as a legal restriction, within the meaning of article 26-2(b) of Regulations 94, upon the corporation as to amounts which it could distribute as dividends within the taxable year 1936. Accordingly, it is held that the corporation is entitled to the credit provided by section 26(c) 1 of the Revenue Act of 1936 in the amount which, *except for the contract with the preferred shareholders* and their refusal to consent, could have been distributed as dividends on the common stock." [Italics added.]

The government has, likewise, successfully sustained the proposition that a so-called "purchase" of a retiring partner's partnership interest was not a "sale" or "purchase" so as to permit the cash gain to the retiring partner to be, at his option, taxable under Section 101(a) of the Revenue Act of 1928. *Helvering, Commissioner* v. *Smith,* 90 F. (2d) 590 (C. C. A. 2nd) reversed the Board of Tax Appeals.* The Second Circuit's opinion per Judge L. Hand, held:

---

* The Memorandum Opinion of the Board is not officially reported. But see Commerce Clearing House, Inc., Board of Tax Appeals Service, Decision No. 9405-G. It was held: "The only question was whether $125,000 received by petitioner in 1930 as consideration for his interest in the law partnership of which he had been a member and from which he was then withdrawing was ordinary income, as the Commissioner determined, or capital gain as petitioner contended. There was no substantial dispute of fact, * * * At the close of trial the Division found the facts as stipulated and testified to and held as a conclusion of law, following *Dudley T. Humphrey,* 32 B. T. A. 280, that the Commissioner's determination erroneously treated the $125,000 as ordinary income and that it was capital gain as petitioner contended."

> "The transaction was not a sale because he got nothing which was not his, and gave up nothing which was." [90 F. (2d) 590, 592.]

This Court, in upholding the right of a minority stockholder to receive from the corporation the value of his stock in cash upon the dissolution of the corporation at the expiration of the term of its corporate existence, has found decisive the principles used in determining the rights of partners upon the dissolution of the partnership. *Mason* v. *Pewabic Mining Company*, 133 U. S. 50, 59:

> "We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution, * * *."

II. THE COURT OF CLAIMS ERRONEOUSLY CONCLUDED IN ITS OPINION AND JUDGMENT THAT SECTION 115(c) WHICH MAKES REFERENCE TO 111 AND 112 BUT NOT TO 101 IS, NEVERTHELESS, TO BE READ AS BROADENING THE DEFINED TERM USED IN SECTION 101(B) WHICH BY SPECIFIC DIRECTION IS THEREINAFTER DEFINED IN 101(c).

A. Sections 101 and 115 Are Mutually Exclusive.

The decision of the Court of Claims, in applying section 115(c) (found in Supplement B which is Supplementary to Subtitle B, Part II, relating to Computation of Net Income), so as to enlarge the scope of section 101 (found in Supplement A which is Supplementary to Subtitle B, Part I, relating only to Rates of Tax), raises a serious question of judicial legislation.

Sections 101 and 115 should not be construed together. They are mutually exclusive. Section 101 deals only with sales or exchanges as therein defined in that section. The

maxim *expressio unius est exclusio alterius* is clearly applicable:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

Botany Mills v. *United States*, 278 U. S. 282, 289; *Paso Robles Mercantile Co.* v. *Commissioner*, (C. C. A. 9th), 33 F. (2d) 653, 654, certiorari denied 280 U. S. 595; *Anderson* v. *P. W. Madsen Inv. Co.*, (C. C. A. 10th), 72 F. (2d) 768, 770; *Martin* v. *Commissioner*, (C. C. A. 2d), 61 F. (2d) 942, 944.

The Court in *McFeely* v. *Commissioner*, 296 U. S. 102, has held that sections 101(c)(8) and 113(a)(5) are mutually exclusive and that "each section should be read as affecting the subject to which alone it applies." Fully as good reason appears for likewise concluding that sections 101 and 115 are mutually exclusive. Section 115(c) refers directly to section 111 which in turn makes reference to section 113. Sections 115, 111, and 113 are all found in Supplement B—Computation of Net Income—and are stated to be Supplementary to Subtitle B, Part II. Under the statutory scheme section 115 like 113 has no relationship to section 101 found in Supplement A entitled "Rates of Tax" and stated to be "Supplementary to Subtitle B, Part I" relating to "Rates of Tax". Part I and Part II of the General Provisions of the Revenue Act of 1928 are supplemented by Supplemental Provisions. The Committee on Ways and Means (Report, Committee on Ways and Means, No. 2, 70th Congress, 1st Session, p. 12) stated:

> "The General Provisions are divided into Parts. * * * In the main, the Supplemental Provisions are those which apply only to extraordinary classes of

taxpayers or which apply only to the extraordinary transactions of ordinary classes of taxpayers. The Supplemental Provisions are divided into Supplements."

It is clear that Congress in the new arrangement of the income tax title did not intend section 115 to be supplementary to section 101.

B. The Court Below Has Ignored the Second Sentence of Section 115(c).

The Court of Claims in its opinion, after quoting the first sentence in section 115 that "Amounts distributed in complete liquidation of a corporation shall *be treated as* in full payment in exchange for the stock, * * *" concluded:

> "The provisions of Section 115 make a liquidating dividend have the same effect as a sale or exchange of property."

But the second sentence of section 115(c) was omitted from the portion of section 115(c) quoted by the Court of Claims in its opinion and entirely disregarded. This disregarded second sentence directs:

> "The gain or loss to the distributee resulting from *such exchange* shall be *determined under section 111; but shall be recognized only* to the extent provided in section 112." [Italics added.]

The use of the phrase "*such* exchange" can only have been intended to invite attention to the same idea in the preceding sentence—"* * * *treated as* in full payment in *exchange* for the stock." To be "treated as" is not to be so in fact. The "treated as in full payment" was solely to distinguish a *liquidating* distribution from the definition of

"dividend" in section 115(a) and (b) which created a presumption that any distribution was out of earnings or profits to the extent thereof.

The omitted second sentence in 115(c) in a clear unequivocal direction states that the *"determination"* is to be under section 111—*not* 101. Moreover it is directed that the loss shall be *"recognized"* for tax purposes *"only"* to the extent provided in section 112*—*not* 101.** Again, as to section 115(c) the maxim *expressio unius est exclusio alterius* is applicable.

It is respectfully suggested that the court below has by judicial legislation made the sentence read:

> "The gain or loss to the distributee resulting from such exchange shall be determined under sections 111 *and 101,* but shall be recognized only to the extent provided in sections 112 *or 101, whichever produces the greater tax.*"

The court cannot enact a law under the pretense of construing one. As was said in *Heiner* v. *Donnan,* 285 U. S. 312, 331:

> "For this court to do so would be to enact a law under the pretense of construing one and thus pronounce itself guilty of flagrant perversion of the judicial power."

C. Cross Reference in Section 115(c) to 111 and 112 Adequate.

An application of section 115(c) according to its literal meaning is possible, sensible and adequate. As to the treatment of amounts distributed in the complete liquidation of a corporation, section 115(c) refers directly to section 111. The terminology of section 111 is:

---

* 100% recognized.
** 12½% recognized.

> "*Except as hereinafter provided in this section,* the gain from the sale or *other disposition* of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the *loss shall be the excess of such basis over the amount realized.*" [Italics added.]

The reference to section 111 in section 115(c) allows the full quantum of the loss. The direct cross-reference in 115(c) and the introductory phrase in 111 shows an intent to *exclude* section 101 from consideration as to the percentage of deductibility recognizable. Literally both 115(c) and 101 are mutually exclusive. Both can be given their literal meaning and produce entirely sensible results. If the language be plain there is nothing to construe. *Hamilton* v. *Rathbone;* 175 U. S. 414, 419; *Thompson* v. *United States,* 246 U. S. 547, 551; see also Mr. Justice Roberts' dissenting opinion, Justices Brandeis and Stone concurring, in *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455, at 471:

> "Nothing could involve more dangerous consequences, than that the courts should rewrite plain provisions of a tax act in order to bring them into harmony with a supposed general policy."

D. Doubt to Be Resolved in Favor of Petitioners.

The very most that can be said for the Court of Claims' conclusion (R. 47) that sections 101 and 115 should be considered together is that it is a doubtful construction. *Chester N. Weaver Co.* v. *Commissioner,* 97 F. (2d) 31, 33. In which event, the rule announced in *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 561 is applicable:

> "If there were doubt as to the connotation of the term, or another meaning might be adopted, the fact

of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer. *Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Merriam*, 263 U. S. 179; *Bowers* v. *Lighterage Co.*, 273 U. S. 346; *United States* v. *Updike*, 281 U. S. 489; *Burnet* v. *Niagara Falls Brewing Co.*, 282 U. S. 648."

Such a doubtful construction, therefore, should be rejected.

E. Decision Below Leads to Absurd Consequences.

The construction by the court below does violence to the literal meaning of sections 23(e), 101, 111 and 115(c) and produces the entirely unreasonable result that the receipt of 1¢ per preferred share, or a total of only $11, would make the tax $12,559.92 greater than if nothing at all had been received. On the literal construction of the sections contended for by the petitioners, the receipt of 1¢ per preferred share would make an increase in tax of only $2.53 over the tax computed if nothing were received, an amount commensurate with the additional income. Such additional tax then becomes comparable to the amount payable if there had been no distribution at all, the preferred stock having been entirely worthless. *Mont S. Echols* v. *Commissioner*, 61 F. (2d) 191 (C. C. A. 8th).

The Common Stock of Del-Bay Farms, Incorporated held by petitioners had admittedly become entirely worthless. The result of the Court of Claims' decision is that losses on the Preferred Stock are recognized only to the extent of 12½% while the losses on the Common Stock are recognized to the full extent thereof. The anomalous result is that the common stockholder thus becomes the preferred taxpayer. A small liquidating distribution is made to be more disadvantageous than no distribution at all. In

Chester N. Weaver Company v. *Commissioner*, 97 F. (2d) 31, 33, the Circuit Court of Appeals for the Ninth Circuit concluded that a construction producing such an anomalous result was to be avoided on the authority of *United States* v. *Katz*, 271 U. S. 354, 357, where it was stated:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose * * *."

It is significant that this Court has previously in construing section 101 placed emphasis on the dollar difference in tax under opposing constructions in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at 467, and footnote 4. Occasion was there taken to call attention to the fact that under the construction contended for by the Government the tax would be $252,667.66, whereas the tax under the taxpayer's contention would be $58,921.51. The conclusion was in favor of the taxpayer, the reason being given:

> "It is to be inferred that Congress did not intend penalization of that sort."

The same thought was again expressed in *McFeely* v. *Commissioner*, 296 U. S. 102, 111.

Congress declared in section 115(c) that reference should be made to 111. Congress said section 111 excludes, in determining losses, section 101. Congress has limited section 101(b) to capital net losses as therein expressly defined in 101(c) to be limited to "sales or exchanges". Notwithstanding, the court below has reached the surprising conclusion that section 115(c) broadens the carefully limited scope of 101 without making reference thereto, and thereby imposes a further qualification on the determination of amount

of loss under section 111 in spite of the express language in 111 to the contrary.

III. THE COURT OF CLAIMS ERRED IN HOLDING THAT CONGRESSIONAL APPROVAL WAS EXPRESSED BY THE ENACTMENT OF SECTION 115(c) AFTER INTERPRETATION BY THE COMMISSIONER, SINCE NO PART OF REGULATIONS 74, ARTICLE 625, MAKES REFERENCE TO CAPITAL LOSSES AND SINCE SECTION 101(b) WAS AMENDED SO AS TO NEGATIVE SUCH CONSTRUCTION.

A. No References to Losses.

The opinion below (R. 47) makes references to Article 625 of Regulations 74 as containing an administrative implication that section 115 makes "a liquidating dividend have the same effect as a sale or exchange of property." The relevant part of Article 625 referred to states:

> "Any *gain* to the shareholder may, at *his option*, be taxed as a capital net *gain* in the manner and subject to the conditions prescribed in section 101 and articles 501-503." [Italics added.]

It will be noticed first that nowhere in the Article is there any reference whatsoever as to what happens in the event of a *loss*. An absence of administrative interpretation apropos of the question for decision furnishes a novel hypothesis upon which to base a conclusion of implied Congressional approval through subsequent enactments.

B. Congressional Disapproval of Regulations by Changes in 1928 Act.

The opinion below concludes (R. 47):

> "Congress would seem to have approved the *Commissioner's interpretation* of the provisions of the 1924 and 1926 acts by *reenacting* them in the 1928 act." [Italics added.]

Even assuming *arguendo* that the Commissioner's Regulations had any interpretation apropos of the treatment of losses, Congress in the Revenue Act of 1928 rather than *reenacting* the section *in haec verba* removed all doubt upon the question by *amending* the provisions of the earlier 1926 and 1924 Acts. Article 1545 of Regulations 65 and 69 contained a cross reference (limited to *gains*) to section 208 of the 1924 and 1926 Acts. But this cross reference was disapproved in the 1928 Act—not by adding language to section 115 (as it was not needed there since as contended herein that section serves an entirely different purpose and is self sufficient) but by an addition to section 101 itself.

Revenue Act of 1928. [Section 101(b)]	*Revenue Act of 1926.* [Section 208(c)]
"In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss. (*as hereinafter defined in this section*), there shall be levied, collected, and paid * * *"	"In the case of any taxpayer (other than a corporation) who for any taxable year sustains a capital net loss, there shall be levied, collected, and paid * * *"

The phrase "(*as hereinafter defined in this section*)" was added for a purpose. It was added in both 101(a) and 101(b). The phrase excludes any other definition for "capital net loss". The clear intent of Congress should not be set aside by resort to a cross reference in Regulations under prior acts which have been disapproved and which do not even contain language literally covering the instant situation.

The rule announced by this Court in *McFeely* v. *Commissioner*, 296 U. S. 102, 111 applies:

> "Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

IV. THE COURT OF CLAIMS ERRED IN CONSTRUING SECTION 115(c) AS THE RESULT REACHED IS CONTRARY TO THE HISTORY AND THE PURPOSE OF THE SECTION.

Congress in the Revenue Act of 1913, passed shortly after the adoption of the Sixteenth Amendment, made dividends taxable as income at surtax rates. The term dividend was not defined. In such absence of a definition, the ordinary accepted meaning of the term dividend would not include liquidating distributions. In *Lynch* v. *Hornby*, 247 U. S. 339, 344, this Court held that a "dividend" by a going corporation out of pre-March 1, 1913, earnings was taxable:

> "In short, the word 'dividends' was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the interest and rent received upon other forms of invested capital."

But the Court on the same day, June 3, 1918, decided in *Lynch* v. *Turrish*, 247 U. S. 221, that under the same Act the profit on a stock interest in a corporation was not taxable where it had been extinguished by the receipt of a liquidating distribution in an amount in excess of the cost of the stock interest. This decision the Treasury Department regarded as revealing a serious loop-hole in the law. As the Revenue Act of 1918 was then in the course of preparation what became section 201(c) of the Act was written into the bill. This provided that:

> "Amounts distributed in the liquidation of a corporation *shall be treated as* payments in exchange

for stock or shares, and *any gain or profit* realized thereby shall be taxed to the distributee *as other gains or profits.*" [Italics added.]

The Treasury Department and Congress were thinking only of insuring the collection of a tax upon any gain realized upon liquidations similar to those held not taxable in *Lynch* v. *Turrish*, 247 U. S. 221.† As "income" meant "'the *gain* derived from *capital*, labor or from both combined', provided it be understood to include *profit gained through a sale or conversion of capital assets*" (*Eisner* v. *Macomber*, 252 U. S. 189, 207), the analogy chosen was to tax the liquidating profit gained through conversion in the same manner as "other gains or profits" were already taxed under the 1918 Act.*

Significant is the fact that at the time of the Revenue Act of 1918 there was no provision in the law comparable to section 101 of the 1928 Act providing a special treatment for "capital net gains" and "capital net losses". Therefore, historically, the original provision in section

† See, for example, Treasury Regulations 45 promulgated under the Revenue Act of 1918, Section 201(c): "Art. 1548. *Distribution in liquidation.*—So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payments for the stock of the dissolved corporation. *Any excess so received over the cost of his stock* to the stockholder, or over its fair market value as of March 1, 1913, if acquired prior thereto, *is a taxable profit.* A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrrent return upon the stock."

*See Section 213(a) of the Revenue Act of 1918 defining "gross income". Section 213(a) of the Revenue Act of 1918 is comparable to section 22(a) of the Revenue Act of 1928 which is reproduced in the Appendix, p. 31.

201(c) of the Revenue Act of 1918: "Amounts distributed in the liquidation of a corporation *shall be treated as* payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee *as other gains or profits*", has no relation whatsoever to the special treatment later accorded "capital net gains" and "capital net losses" in section 101 of the Revenue Act of 1928. It would, therefore, be unreasonable to construe the subsequently introduced section 101 dealing with only "sales or exchanges" as requiring a changed meaning for the already well-understood provisions of section 115(c), relating to the treatment to be accorded the conversion or liquidation of an existing investment. The governmental urge to have all transactions capital in nature treated as "sales or exchanges" runs afoul of the rule distinctly stated in *McFeely* v. *Commissioner*, 296 U. S. 102, 110, in construing section 101(c)(8) with section 113(a)(5):

> "The fact that the two sections deal with the same general subject—capital gains—is cited in support of the Commissioner's position that they ought to be consistently applied. There is, however, nothing novel in the naming of arbitrary 'basis' dates differing from the admitted dates of acquisition."

A liquidating distribution is a payment terminating the stockholder's proprietary interest or investment in the corporate enterprise. It is the consummation of the stockholder's right to a proportional part of the effects of the corporation when dissolved, after the payment of its debts. The effect is to wipe out the stockholder's interest in the corporation. The liquidation of the stockholder's proprietary interest through payment is a transaction capital in character rather than current or periodic.

The difference in character is what motivated Congress to accord a different treatment to "liquidating distributions" than accorded to ordinary or current dividend distributions. In *Hellmich* v. *Hellman*, 276 U. S. 233, it was decided, under section 201 of the Revenue Act of 1918, that the gain realized by stockholders upon the distribution in liquidation of the assets of a dissolved corporation was capital in character and taxable as "other gains or profits" under section 201(c) rather than a current "dividend" governed by section 201(a), even though the payment was made out of the corporation's accumulated earnings or profits:

> "* * * we think it clear that the general definition of a dividend in §201(a) was not intended to apply to distributions made to stockholders in the liquidation of a corporation, but that it was intended that such distributions should be governed by §201(c), which, dealing specifically with such liquidation, provided that the amounts distributed should 'be treated as payments in exchange for stock' and that any gain realized thereby should be taxed to the stockholders 'as other gains or profits.' This brings the two sections into entire harmony, and gives to each its natural meaning and due effect. The Treasury Regulations correctly interpreted the Act as making §201(a) applicable to a distribution made by a going corporation to its stockholders in the ordinary course of business, and §201(c) applicable to a distribution made to stockholders in liquidation of the corporation." [276 U. S. 233, 237]*.

---

* The effect of this Court's decision was to settle the point that the gain or profit realized upon a stock investment at the time of the liquidation of a corporation was subject to tax both at the normal and surtax rates. Ordinary dividends were not subject to the normal tax but only the surtax.

Subsequently, when the sections of the Revenue Acts were renumbered in the Revenue Act of 1928 and the present order of sections adopted, section 201 became 115. Intrinsic evidence of the Congressional intent to preserve the historical relationship of liquidating profits to "other gains or profits" is found in the cross-reference contained in section 22 dealing with "Gross Income" made in subdivisions (d) and (e). Section 115(c) makes no reference to section 101 but makes specific reference to sections 111 and 112. On the other hand, at no place in sections 21, 22 or 23 or, for that matter, Part II of Subtitle B, is there any cross-reference to the provisions of section 101, although section 23 contains in subsections (h) and (i) cross-references to wash sales under section 118 and net losses of prior years allowed under section 117. Consequently, there is no intrinsic evidence that Congress intended a liquidating gain or loss which was not *in fact* a "sale or exchange" to be regarded as one under section 101.

V. The judgment rendered below is contrary to the provisions of section 23(e), the Court of Claims erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections.

A. Opinion Ignores Section 23(e).

Nowhere in the opinion below is there any consideration given to section 23(e) of the Revenue Act of 1928. This section, granting the petitioners a 100% deduction in unequivocal terms on their losses on their stock interests in Del-Bay Farms, Incorporated, has been ignored, the Court of Claims poising the construction problem as follows (R. 46):

> "The case turns on the construction of sections 101 and 115 of the revenue act of 1928 as applied to capital gains and losses."

This is the more surprising since under the special findings of fact No. 1 submitted by petitioners, it was found (R. 37-38):

> "* * * The issues to be determined by the Court are identical in the two cases, the chief of which is whether the loss for 1929 should be treated as an ordinary loss under section 23(e) of the Revenue Act of 1928 as claimed by plaintiff or as a capital loss under section 101 of the same Act as claimed by defendant."

B. Every Relevant Section Should Be Considered.

Petitioners are not advised by the opinion below why section 23(e) should not be considered; why the construction adopted should not at least attempt to harmonize all three provisions, sections 23(e), 101(b), and 115(c). See *Hellmich* v. *Hellman*, 276 U. S. 233, 237; *Kohlsaat* v. *Murphy*, 96 U. S. 153, at 159-160.

C. Relationship Between Sections 23 and 101 Established.

The statutory relationship between one of the subdivisions of section 23 and section 101 has been the subject of special consideration by this Court in *Helvering* v. *Bliss*, 293 U. S. 144, wherein it was unanimously held (p. 150):

> "By the express words of §23(n) charitable contributions are to be deducted to ascertain net income as defined in §21; and nothing in §101, which prescribes merely a method for segregating a portion of that net income for taxation at a special rate, in any

wise alters the right of the taxpayer to take the deduction in accordance with §23(n)."

This Court also took special pains to point out (p. 151):

> "Nor should the reduction in the rate of tax on capital gain, first granted in the Revenue Act of 1921, be held to circumscribe the privilege granted in the earlier Acts, and retained in later ones, with respect to charitable contributions, unless that result be plainly required by the language used."

No reason can be found why subdivision (e) of section 23 should not be accorded the same treatment as subdivision (n).

CONCLUSION

It is submitted that the decision by the Court of Claims below entirely ignores the full allowance of the petitioners' losses under section 23(e) and under the second sentence of section 115(c); that it is based upon a misconstruction of section 115(c) and an unwarranted broadening of the meaning of section 101 not justified by decisions of this Court. The judgments entered below should be reversed.

Respectfully submitted,

JOHN P. OHL
CHARLES C. PARLIN
Attorneys for Petitioners,
63 Wall Street,
New York, N. Y.

October 28, 1938.

APPENDIX

Statutes Involved

REVENUE ACT OF 1928, c. 852, 45 STAT. 791

[Italics supplied]

TITLE I—INCOME TAX†

SUBTITLE A—INTRODUCTORY PROVISIONS†

* * *

SUBTITLE B—GENERAL PROVISIONS†

Part I—Rates of Tax

* * *

Part II—Computation of Net Income

"SEC. 21. NET INCOME.

'Net income' means the gross income computed under section 22, less the deductions allowed by section 23.

"SEC. 22. GROSS INCOME.

(a) General Definition.—'Gross income' includes *gains, profits,* and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades,

† A fresh start was made in preparing the Revenue Act of 1928. The explanation of the Committee on Ways and Means (Report, Committee on Ways and Means, No. 2, 70th Congress, 1st Session, p. 12) stated: "The bill embodies a proposed new arrangement for the income tax title. The basis for the arrangement is the distribution of the provisions by two classifications: General Provisions and Supplemental Provisions. There are a few Introductory Provisions. The General Provisions are those which apply to the ordinary transactions of the ordinary classes of taxpayers. It is be-

businesses, commerce, or *sales,* or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or *gains* or *profits* and income derived from any source whatever.

(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * *

(d) Distributions by Corporations.—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

(e) Determination of Gain or Loss.—In the case of a *sale or other disposition* of property, the gain or loss shall be computed as provided in sections 111, 112, and 113.

* * * *

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions: * * *

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * *

---

lieved that approximately 80 per centum of the taxpayers who file returns under the new Act will find in the General Provisions practically all the income tax statute law of interest to them. The General Provisions are divided into Parts. * * * In the main, the Supplemental Provisions are those which apply only to extraordinary classes of taxpayers or which apply only to the extraordinary transactions of ordinary classes of taxpayers. The Supplemental Provisions are divided into Supplements." To the same effect see Report, Senate Finance Committee (Report, Committee on Finance, No. 960, 70th Congress, 1st Session, p. 18).

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

* * *

(f) Losses by Corporations.—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise,

(g) Basis for Determining Loss.—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the same as is provided in section 113 for determining the gain or loss from the *sale or other disposition* of property.

* * *

SUBTITLE C—SUPPLEMENTAL PROVISIONS†

Supplement A—Rates of Tax†

[Supplementary to Subtitle B, Part VI]†

"SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) Tax in case of capital net gain. * * *

(b) Tax in case of capital net loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a *capital net loss (as hereinafter defined in this section)*, there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

† See Congressional explanation footnote, p. 31, *supra*.

(c) Definitions.—For the purposes of this title—

• • • •

(2) 'Capital loss' means deductible loss resulting from the *sale or exchange* of capital assets.

(3) 'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets *sold or exchanged* during the taxable year.

• • • •

(6) *'Capital net loss'* means the excess of the sum of the *capital losses* plus the capital deductions over the total amount of capital gain.

(7) 'Ordinary net income' means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) 'Capital assets' means property held by the taxpayer *for more than two years* (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. • • •

Supplement B—Computation of Net Income†

[Supplementary to Subtitle B, Part II]†

"SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) Computation of gain or loss.—*Except as hereinafter provided in this section,* the gain from the *sale or other disposition* of property shall be the excess of the amount

† See Congressional explanation footnote, p. 31, *supra.*

realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

(b) Adjustment of basis.—In computing the amount of gain or loss under subsection (a)—

(1) Proper adjustment shall be made *for any* expenditure, *receipt,* loss, or other item, *properly chargeable to capital account,* and • • •

(c) Amount realized.—The amount realized from the *sale or other disposition* of property shall be the sum of any *money* received plus the fair market value of the *property* (*other than money*) received.

(d) Recognition of gain or loss.—In the case of a *sale or exchange,* the extent to which the gain or loss determined under this section shall be *recognized* for the purposes of this title, shall be determined under the provisions of section 112.

• • •

"SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) General rule.—Upon the *sale or exchange* of property the entire amount of the gain or loss, determined under section 111, shall be *recognized, except as hereinafter provided in this section.* [None of the exceptions except (g) can possibly be relevant.]

• • •

(g) Distribution of stock on reorganization.—If there is distributed, in pursuance of a plan of *reorganization,* to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, *without the surrender by such shareholder of stock* or securities in such a corporation, no gain to the distributee from the receipt of

such stock or securities shall be recognized. [This believed not applicable as there was no reorganization.]

* * *

"SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the *sale or other disposition* of property acquired after February 28, 1913, shall be the cost of such property; except that * * * [None of the exceptions applicable].

* * *

"SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) Definition of dividend.—The term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders, whether *in money or in other property*, out of its earnings or profits accumulated after February 28, 1913.

(b) Source of distributions.—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the basis of the stock provided in section 113.

(c) Distributions in liquidation.—Amounts distributed in complete liquidation of a corporation *shall be treated as in full payment in exchange for the stock,* * * *. The gain or loss to the distributee resulting from *such exchange* shall be *determined under section 111, but shall be recognized only to the extent provided in section 112.* * * *"

REGULATIONS 74.

"ART. 625. **Distributions in liquidation.**—Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation are to be treated as in part or full payment in exchange for the stock so canceled or redeemed. The phrase 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. A complete cancellation or redemption of a part of the corporate stock may be accomplished, for example, by the complete retirement of all the shares of a particular preference or series, or by taking up all the old shares of a particular preference or series and issuing new shares to replace a portion thereof, or by the complete retirement of any part of stock, whether or not pro rata among the shareholders.

The gain or loss to a shareholder from a distribution in liquidation is to be determined, as provided in section 111 and article 561, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113 and articles 591-604; but the gain or loss will be recognized only to the extent provided in section 112 and articles 571-580. Any gain to the shareholder may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 and articles 501-503. In the case of amounts distributed in partial liquidation, other than a distribution in pursuance of a plan of reorganization as described in section 112(h), the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of section 115(b) for the purpose of determining the taxability of subsequent distributions by the corporation.

Example (1): A owns 10 shares of stock in the M Corporation for which he paid $1,250 in 1923. He receives in 1928 a dividend of $1,500 in complete liquidation. A is subject both to the normal tax and to the surtax upon his profit of $250 or at his option, in lieu of such taxes, to the tax upon capital net gain.

Example (2): A owns 10 shares of preferred stock and 10 shares of common stock in the M Corporation which he purchased in 1918 for $1,100 and $1,000, respectively. In 1928 the M Corporation has on hand $225,000 of capital, earnings and profits of $25,000 accumulated prior to March 1, 1913, and earnings and profits of $125,000 accumulated after February 28, 1913. The preferred stock is retired at $125 per share, $125,000 being used by the corporation for this purpose. A receives $1,250 in exchange for his 10 shares of preferred stock and is therefore subject to the normal tax and the surtax on $150, or at his option, in lieu of such taxes, to the tax upon capital net gain. The M Corporation then distributes a cash dividend of $25,000 on the common stock, which is subject only to the surtax. Without any further accumulation of earnings and profits, the M Corporation thereafter liquidates completely. A receives $2,250 in exchange for his 10 shares of common stock and is therefore subject to the normal tax and the surtax on $1,250, or at his option, in lieu of such taxes, to the tax upon capital net gain."

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 16 1938
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., and WILLIAM I. FROTHINGHAM, as Executors of the Estate of Alexander M. White,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, Sole Surviving Executor of the Estate of William A. White,

Petitioner,

vs.

THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

JOHN P. OHL,
CHARLES C. PARLIN,
JOHN W. FROST,
Counsel for Petitioners,
63 Wall Street,
New York, N. Y.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
I.	1
A. Section 101 Deals Only With "Sales or Exchanges"	1
B. Analogy to "Sales or Exchanges" Insufficient	5
II.	10
A. Sections 101 and 115 are Mutually Exclusive	10
B. The Court Below Has Ignored the Second Sentence of Section 115(c)	15
C. Cross-Reference in Section 115(c) to Sections 111 and 112 Adequate	16
D. Doubt to Be Resolved in Favor of Petitioners	16
E. Decision Below Leads to Absurd Consequences	16
III.	17
A. No References to Losses	17
B. Congressional Disapproval of Regulations by Changes in 1928 Act	18
IV. Respondent's Analysis of the Legislative History of Section 115(c) and Section 101 Is Inaccurate	19
V. Reference to the Committee's Reports Is Inappropriate	24
A. Committee Reports Under 1924 Bill	25
B. Section 23(k)(2) of Revenue Act of 1938	28
C. Changes Made in 1934 and Later Acts in Relationship of Former Section 101	29
D. 1934 Amendment to Sections 115(c) and 117	30
E. Committee Reports Relating to 1934 Bill	31
VI. In Number 97 the Refund Claim is Valid for the Full Amount	34
Conclusion	38

Citations.

Cases: PAGE

American Tobacco Co. v. *Werchmeister*, 207 U. S. 284, 293 24

Blair v. *Birkenstock*, 271 U. S. 348 35
Burnet v. *Harmel*, 287 U. S. 103 ..... 17, 23

Childs v. *Commissioner*, 35 B. T. A. 1125 9

Dahlinger v. *Commissioner*, 51 F. (2d) 662, 663 (C. C. A. 3rd) 23

Echols v. *Commissioner*, 61 F. (2d) 191 (C. C. A. 8th) 22

Gates v. *Commissioner*, 9 B. T. A. 1133 8
Goodyear Tire and Rubber Co. v. *United States*, 273 U. S. 100 7

Hellmich v. *Hellman*, 276 U. S. 233 6
Helvering v. *Bliss*, 293 U. S. 144 ..... 3, 15, 19

Langstaff v. *Lucas*, 9 F. (2d) 691 (W. D. Ky.) aff'd. 13 F. (2d) 1022 (C. C. A. 6th) 5
Lynch v. *Hornby*, 247 U. S. 339, 341 22
Lynch v. *Turrish*, 247 U. S. 221, 226 22

Norfolk & West. Ry. Co. v. *Sims*, 191 U. S. 441, 447 23

Old Colony R. Co. v. *Commissioner*, 284 U. S. 552, 561 23

Penn Mutual Life Insurance Company v. *Lederer*, 252 U. S. 523, 537-538 32
Piper v. *Wilcutts*, 64 F. (2d) 813, 815-816 (C. C. A. 8th) 28
Preston V. Keene, 39 U. S. [14 Peters] 133, 137 23

CASES: PAGE

Rands v. *Commissioner*, 34 B. T. A. 1107 ..... 9, 18
Robinson v. *Commissioner*, 27 B. T. A. 1018, 1021 9

Schutz v. *Jordan*, 141 U. S. 213, 215 23

United States v. *Fairbanks*, 95 F. (2d) 794 8
United States v. *Merriam*, 263 U. S. 179, 187 23

Washington & Turner v. *Ogden*, 66 U. S. [1 Black.] 450, 456 23
Watson, John H., Jr. v. *Commissioner*, 27 B. T. A. 463 9
Weaver Co. v. *Commissioner*, 97 F. (2d) 31, 33 (C. C. A. 9th) 8
Werner, Henry P. v. *Commissioner*, 15 B. T. A. 482 9
Williamson, et al. v. *Berry*, 49 U. S. [8 Howard] 495, 543-544 23

STATUTES: PAGE

Revenue Act of 1924, section 201(c) 25
Revenue Act of 1924, section 203 25
Revenue Act of 1928, section 22(d) 11
Revenue Act of 1928, section 101 ..... 1, 10, 18, 19, 29
Revenue Act of 1928, section 111 ..... 15, 16
Revenue Act of 1928, section 112 ..... 13, 16
Revenue Act of 1928, section 115(c) 10, 15, 16, 19
Revenue Act of 1928, section 321 34
Revenue Act of 1928, section 322(a) 34
Revenue Act of 1934, section 115(c) 30
Revenue Act of 1934, section 117 29
Revenue Act of 1938, section 23(k)(2) 28

MISCELLANEOUS:

Griswold, (1935) 48 Harv. L. Rev. 1032, 1035 32
S. M. 1957, Cum. Bull. Sales Tax Rulings, Dec., 1920, p. 104 7
Regulations 45, Article 1548 8
House Report No. 350, 67th Cong., 1st Sess., pp. 10-11 24
House Report No. 2, 70th Congress, 1st Session, p. 12 12
Treasury Decision 2752, Vol. 20, Treasury Decisions Under Internal Revenue Laws of the United States, Jan.-Dec., 1918, pp. 481, 482 7
House Report No. 704, 73d Cong., 2d Sess., p. 30 31
Senate Report No. 558, 73rd Cong., 2d Sess., p. 37 31

In the Supreme Court of the United States

OCTOBER TERM, 1938.

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., and WILLIAM I. FROTHINGHAM, as Executors of the Estate of Alexander M. White,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, Sole Surviving Executor of the Estate of William A. White,

Petitioner,

vs.

THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

POINT I.

A. Section 101 Deals Only With "Sales or Exchanges".

Standing alone section 101 of the Revenue Act of 1928 deals only with rates of tax and then only where there has been a "sale or exchange." Standing alone the literal

meaning of "sale or exchange" is not inclusive of the idea of liquidation. Although section 101 is replete with defined terms, "sale or exchange" has not been defined. Therefore, its literal meaning should prevail in the absence of some other compelling consideration.

Against this position, respondent's argument is in the nature of a confession and avoidance. Nothing is addressed unequivocally to the context of the section alone but rather to its interdependency with certain other sections. For example, respondent (Resp. Brief, p. 18) contends: "The statute makes it clear that sections 23 and 101 are interdependent" and (Resp. Brief, pp. 24-25) that "The taxpayers have failed to show that the loss is clearly allowed by section 23(e) *apart* from section 101", and that, in fact, the loss plainly is *limited* by section 101.

That there is an interrelation between sections 23 and 101 we have not denied. The nature of the relationship is the crux of the problem of construction but only because of respondent's necessity of finding some compelling consideration that avoids the effect of the literal meaning of section 101.

In reply to respondent's argument by way of "avoidance", based upon the nature of the interrelation of sections 23 and 101, we submit that nothing in section 101 curtails our right to *deduction* under 23, because 101 deals only with *computation of tax rates*. Respondent's position (Resp. Brief, pp. 21-22) is that "Section 101(b) *limits* 23(e) and that while 23(e) does determine *deductibility* section 101 limits the amount of the *deduction*." As to this we submit that reading 101 in a manner to limit *deductibility* under 23 for determining *net income* under section 21 is, in view of Mr. Justice Roberts' clearly stated analysis of

these sections in *Helvering* v. *Bliss*, 293 U. S. 144, so opposed to the decision of this Court that unless the case be overruled the respondent's construction cannot possibly prevail. There the Court stated (p. 147):

> "The scheme of all the Revenue Acts since that of 1916 has been to sweep all income of every sort, *including capital gains*, into what is denominated *gross income* and to authorize certain *deductions* therefrom in order to arrive at *net income*,—the *base for the calculation of the tax.*" [Italics added.]

The Court continued, after adverting to the reasons for the enactment of the 12½% rate in section 101 (p. 148):

> "The accomplishment of this purpose of applying two rates to *two different kinds of net income*, required new provisions *as to the base for each rate.* Section 101 of the Revenue Act of 1928 prescribes the method to be followed. * * * In the Act of 1928, as will be seen by reference to §§21, 22 and 23 (*supra*, note 4), *the statutory concept of net income is preserved.* These sections are found in Part II of Title I, which deals with '*Computation of Net Income.*' *Section 101, on the other hand*, is found under 'Supplemental Provisions', and is captioned 'Supplement A—*Rates of Tax*'. *It is obviously directed to the matter of computation of Tax on a portion of net income as defined in § 21* [which is 22 less 23]. There is nothing novel in such *a division* of the statutory net income into parts for the purpose of applying different *rates of tax* * * *." [Italics and matter in brackets added.]

Respondent is right—the sections are interdependent; but respondent's analysis of the nature of the relationship shows a flagrant disregard of this Court's construction of these sections 101 and 23 of the Revenue Act of 1928.

Such decision of this Court suffices to answer the mere quotation by respondent (Resp. Brief p. 18) from section 101 of those defined terms which make reference to section 23. Such definitions are limited, as this Court has held, to a taxation of a portion of the income at a special rate and do not at all constitute a generic limitation upon the computation of net income.

We submit that the proper analysis of the interrelation is as follows: You first determine net income under 21 by taking gross income in 22 (including capital gains) and deducting losses under 23. You then have net income. Nothing in 101 changes what you do so far. Now, you are ready to apply the *rate provisions* found in Part I and Supplement A. Section 101 is in Supplement A. The question becomes one of whether the 12½% rate applies. It does not apply to the portion of income segregated unless the income arises from "sales or exchanges". It is not a question, therefore, of *deductibility* from *net income* at all. Section 101 is not a limitation, as respondent claims, on *deductibility* under 23. The only question is one of *segregation* of net income already determined under 21 for the special 12½% rate *in Supplement A*.

An examination of respondent's entire brief will disclose that at no place therein is there any mention of the fact that the sections are in different Supplements and Parts of the Act. Sections from different Parts and Supplements of the Act are placed in physical proximity without noting this fact.* The framework of the Act has been

---

*See for example Resp. Brief, p. 7, where section 101(c) (2) from Part I, Supplement A, is immediately followed by a quotation from section 115 (c) from Part II, Supplement B, and at p. 18 where section 23 in Part II is followed by quotations from subdivisions in section 101 in Supplement A 2, Part I.

completely deleted by asterisks in the Appendix. Respondent's "avoidance" of the literal meaning of the section based upon his conception of the nature of the interrelation is premised upon an entire disregard of the framework of the Act.

B. Analogy to "Sales or Exchanges" Insufficient.

Respondent's reply to petitioners' Point I B does not refute petitioners' contention that an analogy to a "sale or exchange" is insufficient to bring a case within section 101. Now, a liquidation either is, or is not, *in fact* a sale or exchange. Respondent avoids an unequivocal position as to whether a liquidation is, or is not, *in fact* a sale or exchange.* Respondent attempts to create the impression that a liquidation is, in effect, or in fact, a sale or exchange principally by seizing upon a quotation from the opinion in *Langstaff* v. *Lucas*, 9 F. (2d) 691, where the court in contrasting an ordinary dividend with a liquidating dividend, happened to state that a liquidating dividend was, in effect, a purchase of all outstanding stock by the liquidating corporation. Based on this, respondent has stated as its conclusion (Resp. Brief, p. 9) that for tax purposes liquidations are in effect "sales or exchanges" of stock within the meaning of that phrase *"throughout the Revenue Acts and in section 101(c)(2)"*.

* See for example Resp. Brief, p. 4, where it is stated that a corporate liquidation *is* a sale or exchange within section 101 (c)(2) of the Revenue Act of 1928; compare the following sentence on p. 4 which states 115 (c) *requires* a determination that a corporate liquidation is a sale or exchange. Also compare p. 7 the statement that the decisions hold that a corporate liquidation shall be treated *as what they in effect are—sales;* and p. 9 where it is stated that for tax purposes liquidations are *in effect* sales or exchanges.

We submit, first, that the portion of the District Court's opinion in *Langstaff* v. *Lucas, supra* (decided prior to this Court's decision in *Hellmich* v. *Hellman*, 276 U. S. 233), relied upon by respondent, goes far beyond the careful statement later made by this Court upon the same question.* This Court's opinion in the later *Hellmich* v. *Hellman* case, *supra*, points out, in making the same comparison between ordinary and liquidating dividends, that the gain on a corporate liquidation was subject to the same tax burden under the rate provisions—the normal tax—in like manner as if the stockholder had sold his stock to a third party. This was due to the fact that sales and liquidations under the Revenue Act of 1918 fell under section 22, both being regarded as "other gains or profits" for the purpose of determining net income. There was only one set of rates applicable to all gains on all capital transactions under the 1918 Act and no special 12½% rate on capital gains as in later Acts. Obviously, a statement made under such circumstances is far different than a holding that a liquidation is *per se* a sale. It is simply a holding that a liquidation is analogous to a sale.

* The Circuit Court of Appeals for the Sixth Circuit affirmed the *Langstaff* case, *supra*, 13 F. (2d) 1072, upon the reasoning below. The opinion makes it clear that the only problem of construction was to bring the definition of "dividend" into harmony with the special treatment of liquidating distributions. The Sixth Circuit's opinion stated: "Although the half interest in the corporate assets which came to Langstaff was within the broad definition of '*dividend*' in section 201 (a) [comparable to 115 (a) of the 1928 Act] * * *, yet the transaction was the very one specifically provided for in the last sentence of section 201 (c) [comparable to 115 (c) of the 1928 Act], and the half interest became the proceeds of the sale of Langstaff's stock in the corporation, *instead of a corporate dividend*. Only so can the sections [meaning (a) and (c)] be effectively read together." [Italics and matter in brackets added.] There was no section comparable to 101 of the 1928 Act even in the Act under consideration.

We submit, second, that neither *Langstaff* v. *Lucas, supra,* nor *Hellmich* v. *Hellman, supra,* could have possibly established that a liquidation is to be treated as a sale as claimed by respondent "under section 101(c)(2)" because both cases involve the Revenue Act of 1918, and that Act had no provision comparable to section 101(c)(2) at all.

We submit, third, that such cases do not hold that a liquidation is a sale "throughout the revenue acts" as contended by respondent. For example, under Title XI-Stamp Taxes—Schedule A—3 of the Revenue Act of 1918, the same Act as involved in both *Hellmich* v. *Hellman, supra,* and *Langstaff* v. *Lucas, supra,* a tax is imposed upon sales of stock. Here the Treasury Department has uniformly taken the position that no tax is payable where upon the liquidation of a corporation the certificates are surrendered for extinguishment.*

---

* See Treasury Decision 2752, Vol. 20, Treasury Decisions Under Internal Revenue Laws of the United States, Jan.-Dec., 1918, pp. 481, 482:

> "It [the tax] does not apply * * * to the surrender of stock certificates for retirement and redemption for cash. If, however, the corporation buys some of its own stock and transfers it to itself, whether or not it intends eventually to cancel it, the transfer to the corporation is subject to the tax. *The test is whether the immediate transaction results in the extinction of the stock or in vesting title to it in the corporation.*" [Italics added.]

See also S. M. 1257, Cum. Bull. Sales Tax Rulings, Dec., 1920, p. 104 construing the prior T. D. 2752:

> "The meaning in T. D. 2752 is held to be that the surrender of stock certificates for extinguishment, the stockholder receiving in return therefor the value of the stock, is not a transfer of stock, so is not taxable * * *."

We believe the Government cannot deny that they have not attempted to assert or enforce the payment of a stamp tax upon the surrender of stock in connection with the dissolution of a corporation. *Cf. Goodyear Tire and Rubber Co.* v. *United States,* 273 U. S. 100, showing that the real nature of the transaction governs rather than superficialities.

We submit, fourth, that if respondent's position is that a liquidation is in fact a sale or exchange, respondent's position goes far beyond the decisions of the Court of Claims below which specifically recognized that the liquidation was not in fact a "sale or exchange" (Record, p. 46) and far beyond the decision of the Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, 97 F. (2d) 31, 33, to be argued immediately following this case. Even the Treasury Department's own Regulations 45, Article 1548,* promulgated under the Revenue Act of 1918, involved in both *Hellmich* v. *Hellman, supra*, and *Langstaff* v. *Lucas, supra*, recognize that a distribution in liquidation of the assets and business of a corporation is a return to the stockholder of the value of his stock upon his surrender of his interest in the corporation. Moreover none of the elements of a sale or exchange were present according to the test recently laid down by respondent in *United States* v. *Fairbanks*, 95 F. (2d) 794 (Main Brief, p. 12).

We submit, fifth, that the test of the validity of respondent's contention that corporate liquidations are in effect a sale of the stock to the corporation is presented under the 1921 Act. Since for the first time under the 1921 Act the section comparable to section 101 used the phrase "sale or exchange" and since there was no provision comparable to section 115(c), a liquidation was required to stand upon its own merits as to whether it was or was not in fact a "sale or exchange". In *Gates* v. *Commissioner*, 9 B. T. A. 1133, we there find that the Commissioner took the position and the Board of Tax Appeals agreed that the gain upon a complete liquidation was not taxable as a capital gain

* The text of this Article has been reproduced in a footnote on page 25 of our Main Brief.

under the section comparable to 101. We submit that nothing in the decisions supports respondent's conclusion (Resp. Brief, p. 7) that corporate liquidations shall be treated "as what they in effect are—sales of stock to the corporations in liquidation" particularly when it is claimed that this is the meaning to be given "throughout the Revenue Acts and in section 101 (c)(2)."

Respondent's citation of and reliance upon *Childs* v. *Commissioner*, 35 B. T. A. 1125, adds little to its own argument. In the first place, the *Childs* case does not deal with the complete liquidation of a corporation at all, but with a profit realized as a result of a corporation's *redemption* of its preferred stock under an option reserved by the corporation.* It is at best, therefore, but an analogy. Even the reasoning of the case, we believe, cannot be considered as either authoritative or persuasive because the Board of Tax Appeals has twice reversed its position.** The preferred reasoning, it is submitted, is that found in *Rands* v. *Commissioner*, 34 B. T. A. 1107, at page 1116, where it is to be noted that the Board affirmed the Commissioner's contention that the gain was not subject to the provisions of section 101. The Board stated:

> "The gain derived from the redemption of the Motor Products debentures and preferred shares

---

* In *Robinson* v. *Commissioner*, 27 B. T. A. 1018, 1021, it was pointed out that the word "redemption", from the Latin words "re" and "emers", means to *repurchase*.

** *Childs* v. *Commissioner*, 35 B. T. A. 1125, 1126, expressly overruled the case of *Rands* v. *Commissioner*, 34 B. T. A. 1107, stating: "We applied the same rule to the gain derived from the redemption of both corporate debentures and preferred stock, holding that the gain should be treated as ordinary income." *Rands* v. *Commissioner*, 34 B. T. A. 1107, 1116, specifically followed the earlier case of *John H. Watson, Jr.* v. *Commissioner*, 27 B. T. A. 463, which expressly overruled *Henry P. Werner* v. *Commissioner*, 15 B. T. A. 482.

> was treated by the respondent in his determination of the deficiency as capital gain. He [Commissioner] now, *by affirmative pleading*, claims that the capital gain provision does not apply to the proceeds of redemption because the redemption of shares or debentures is *not a sale or exchange;* and that such proceeds are therefore properly to be taxed as ordinary income. This question has been fully considered in *John H. Watson, Jr.*, 27 B. T. A. 463, overruling *Henry P. Werner*, 15 B. T. A. 482, and followed in *Arthur E. Braun, Trustee*, 29 B. T. A. 1161, and *George A. Hellman*, 33 B. T. A. 901. We can see no distinction in principle, and the respondent's contention that the proceeds shall be treated as ordinary income is sustained." [Italics added.]

The position of the Commissioner in this case clearly indicates a lack of consistent administrative policy under the Act.

POINT II.

A. Sections 101 and 115 Are Mutually Exclusive.

Standing alone section 115(c) does not literally refer to section 101. Sections 115(c) and 101 are in different Supplements and Parts of the Act. Conversely, section 101 literally makes no reference to 115(c). Again respondent's argument must be one of confession and avoidance.

Respondent's argument by way of "avoidance" is, again, that there is a relationship which changes the literal meaning. Again we examine the nature of the asserted relationship. The reason given why appellants' construction is not correct, being too involved to paraphrase, is quoted:

> "* * * [Appellants' argument] is contrary to the entire scheme of the Revenue Act and makes the

> fundamental error of merging and confusing the separate and distinct questions of determination of amount of loss under section 111, recognition of loss under section 112, deductibility of loss under section 23, and the limitation on deductible losses, if they are capital losses, under section 101." (Resp. Brief, p. 17).

We submit, that if anyone is confusing the scheme of the statute it is respondent, as is shown by respondent's complete disregard of the fact that certain of the provisions are found in different Parts and Supplements of the Act—a part of the statutory scheme respondent is entirely silent about, as can be readily shown from respondent's own argument (Resp. Brief, pp. 16-18).

We agree with respondent that sections 11, 12 and 13 levy a tax on net income. It cannot be gainsaid that such sections are in Part I—Rates of Tax. We agree that section 12(c) contains a cross-reference to section 101. The cross-reference reads:

> "For *rate* and computation of tax in lieu of normal and surtax in case of net incomes * * *, see section 101." [Italics added.]

Now section 101 is found in Supplement A—Rates of Tax and is stated to be Supplementary to Subtitle B, Part I, which contains all of the sections 11, 12 and 13.

We agree with respondent that section 21 provides that net income means gross income computed under section 22 less the deductions allowed by section 23—all of which are in Part II—Computation of Net Income. We agree with respondent that section 22(d) in Part II provides that distributions by corporations shall be taxable to the shareholders as provided in section 115, which is in Supplement

B—Computation of Net Income, stated to be Supplementary to Subtitle B, Part II. We agree with respondent that section 115(c) provides that amounts distributed in liquidations shall be treated as the full payment in exchange for the stock and the gain or loss shall be determined under section 111 and recognized to the extent provided in section 112, all of which sections 111, 112 and 115 are found in Supplement B—Computation of Net income. So far we are in entire agreement as to the meaning and framework of the Act.

Respondent's analysis then continues that recognition of a loss is not a determination* that the loss is deductible. Here is the first disagreement as to the framework of the Act. The Committee on Ways and Means (Report, Committee on Ways and Means, No. 2, 70th Congress, 1st Session, p. 12) makes the statement directly relating to the framework of the 1928 Act that the general provisions are those which apply to the ordinary transactions of ordinary classes of taxpayers; that the general provisions are divided into Parts; and that the supplemental provisions are divided into Supplements. It is also stated that in the

---

* If respondent intended to make a play on the word *determination*, the sentence is very misleading. *Determination* in its technical sense is provided for in section 111. If respondent intended to paraphrase appellants' analysis, it is not a fair summary of appellants' statement (App. Brief, p. 6):

> "The amount of the loss to be recognized is provided for in section 112, wherein it is stated that the entire amount of the gain or loss determined under section 111 shall be recognized except as thereinafter provided in said section."

If respondent used *determination* as synonymous with *recognize*, the choice of terminology is inaccurate, as section 112 relates solely to recognition and section 115 states that after the amount is determined under section 111 it is recognized only to the extent provided for in section 112.

main the supplemental provisions apply only to extraordinary classes of taxpayers or only to extraordinary transactions of ordinary classes of taxpayers. A liquidation is an extraordinary transaction of an ordinary taxpayer having his net income computed under Part II of the General Provisions. Against these statements as to the intent of Congress, we submit that the use of the word *recognize*, both in sections 115 and 112, means what it says, to recognize—to allow. It is a confusion of thought to say that *recognize* means to *determine not to allow.*

Respondent's argument, therefore, that section 112 relates to the question of postponement of a loss until a later year is inaccurate and but half a truth. Section 112(a) states succinctly what is called the "General rule" that:

> "(a) General rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, *except as hereinafter provided in this section.*" [Italics added.]

The half truth is that admittedly if a case falls within the exceptions thereinafter provided in section 112, the gain or loss is not recognized—not allowed—but it is postponed. The fallacy in respondent's argument is therefore clear. If the case does not fall within any exception in section 112 the loss is recognized—allowed—not postponed. Respondent does not contend the instant cases fall within any exception.

On the other hand, respondent's position is that section 23 governs over the extraordinary provisions of 115—respondent stating (Resp. Brief, p. 18) that "the question whether the recognized loss is of a type which Congress

permits to be deducted is determined under section 23." So, on respondent's analysis, we have gone from the general provisions to the extraordinary provisions and now we come back to the general provisions. While as indicated above, we disagree that such a ring-around-the-rosy was ever intended, respondent gains nothing even on such an analysis with respect to the only important question—is 100% of the loss deductible in arriving at the Computation of Net Income under Part II and/or Supplement B. Either way, we submit our "net income" under 21 is arrived at by deducting 100% of the loss. Consequently, although we disagree with what we regard as a confused analysis we have found nothing so far which restricts our full loss.

Respondent's argument continues (Resp. Brief, p. 18) that "if the loss is within the type of loss permitted by section 23, *the question remains* whether it is a capital loss which may be deducted only to the extent and in the manner provided in section 101." We submit that finally respondent has arrived at the real question; the question which we discussed at the outset of our main brief in Point I A. So far respondent has said nothing which casts any doubt upon the fact that section 23 standing alone permits by its literal terms the full 100% deduction from loss on gross income in order to compute net income under section 21.

Respondent's analysis ends (Resp. Brief, p. 18) with an assertion unsupported by any reasoning that sections 23 and 101 are interdependent and with the mere citation of some of the defined terms in 101(c). This is evidently believed to end the matter—but just how is not stated. Our reply to the nature of the interrelation between sections 101 and 23 is set forth at pp. 1 to 5 hereof to which reference is

made. We submit that the true relationship approved by this Court in *Helvering* v. *Bliss, supra,* shows that nothing in section 101 limits deductibility in determining net income under Part II of the Act.

B. The Court Below Has Ignored the Second Sentence of Section 115(c).

Respondent does not advert to the omission by the court below to give effect to the second sentence of section 115(c) which provides how "such exchange" shall be treated but says nothing about section 101. The Respondent's Brief, pp. 16, 17-18, admits that section 115(c) provides that the gain or loss shall be *determined* under section 111 and *recognized* to the extent provided in section 112. At page 4 of Respondent's Brief by way of refutation, it is stated that "Losses upon corporate liquidations are not deductible, *as the taxpayers contend,* under sections 23(e) and 112, apart from sections 101 and 115(c)."

The respondent attributes to us an argument we have not made. We have never argued that sections 23(e) and 112 should be considered apart from sections 101 and 115(c). Such a grouping of the sections we believe to be entirely unjustified. Our position is that section 23(e) (and all other sections in Part II) as supplemented by all the sections in Supplement B (including particularly sections 111, 112, 113 and 115(c)), considered apart from section 101 (found in another Supplement A relating to Part I), recognizes—allows—the deductibility of the loss from net income under the Computations of Net Income sections.

Section 101 in Supplement A to Part I, considered apart, does not prohibit the deduction nor operate in a manner to make the 12½% limitation applicable.

C. Cross-Reference in Section 115(c) To Sections 111 and 112 Adequate.

The analysis contained in Respondent's Brief concedes the fact that section 115(c) refers to sections 111 and 112 (Resp. Brief, pp. 17-18). Nothing is said to show that the cross-reference is inadequate. No explanation for Congress' failure to make a cross-reference to section 101 is given. Respondent's argument resolves itself into the claim that despite an adequate cross-reference it was intended to make a liquidation a sale for all provisions throughout the Act including section 101. This flies in the face, we submit, of a definite reference that "such exchange" is governed by two sections—111 and 112. Respondent's construction is not a literal reading of the Act and no compelling reason or circumstances have been shown which should motivate the Court to expand the ordinary meaning of section 101.

D. Doubt To Be Resolved In Favor Of Petitioners.

Respondent does not deny the rule that, if the Act is even doubtful, the doubt is to be resolved in favor of the taxpayer. Respondent only contests the application of the rule. We submit that respondent's construction is at least doubtful.

E. Decision Below Leads To Absurd Consequences.

Respondent's answer to our argument that the decision below leads to absurd consequences is that the absurdity is due to Congress' failure to treat worthless securities as a sale or exchange rather than to the failure to treat corporate liquidations like worthless securities. True, there was a failure on the part of Congress to treat worthless securi-

ties like "sales or exchanges." But there was also a failure of Congress to treat liquidations like "sales or exchanges." Both "failures" arise from the fact that Congress intended that "sale or exchange" in section 101 should have only its ordinary and accepted meaning (*Burnet* v. *Harmel*, 287 U. S. 103). The respondent's argument is pure sophistry. The major hypothesis is wrong.

Respondent's attempt (Resp. Brief, p. 24) to show that equally illogical results will ensue from an application of the section as appellants construe it is entirely unsound. The burden of the absurdity which we claim is that the receipt of 1¢ per preferred share or a total of only $11 makes the tax $12,559.92 greater than if nothing at all had been received. We submit that respondent's illustration about one who has a gain of $100,000 is not responsive. Any gain is taxed at graduated rates. The more gain the higher the rate. On the literal construction of the sections for which we contend the receipt of 1¢ per preferred share on a loss transaction would make an increase in tax of only $2.53 over the tax computed if nothing were received, an amount commensurate with the additional income. We submit that to be responsive, respondent's illustration should result in a tax upon the receipt of an $11 gain greater than the tax upon the receipt of a much greater gain.

POINT III.

A. No References to Losses.

In answer to our argument that the Regulations contain no references to losses, respondent first states that the Commissioner relied on the fact that since the Regulations referred to gain, he ought to take it on himself to apply the same rule as to losses against the petitioners. We submit

that the Commissioner does not hold a mandate from Congress to bring about by administrative action a supposed symmetry and consistency in the extremely detailed and complicated provisions of the Revenue Act, which he thinks exist, but which somehow Congress failed to express and which he had failed to provide for in the Regulations.

An examination of respondent's citation of the cases (Resp. Brief, p. 11) will disclose that in each instance there was some administrative interpretation apropos of the question directly being considered. How such cases can have a bearing upon a situation where there is no administrative ruling apropos of the issue involved but only the Commissioner's inference from his own rationalization, we confess we cannot understand.

Moreover, the Commissioner has not always felt the same urge for consistency. In *Rands* v. *Commissioner*, 34 B. T. A. 1107, he interposed by affirmative pleading the claim that the capital gains provision did *not* apply to the proceeds of redemption of preferred shares and debentures because such transactions were *not sales or exchanges.*

In addition, respondent assumes its conclusion when it states that the Regulations "correctly" treats a corporate liquidation as a sale or exchange within section 101(c) of the Act. We submit that this assumption is contrary to the separate histories of both sections 101 and 115(c) (see *infra*, pp. 21 to 25) and Congressional disapproval has been indicated.

B. Congressional Disapproval of Regulations By Changes in 1928 Act.

To appellants' argument that Congressional disapproval of the Regulations was indicated by the changes made in the 1928 Act, respondent argues that the phrase "(as

hereinafter defined in this section)" which was added for the first time in the 1928 Act, upon a comparison of the whole section appears to be an addition, that is, "not one of substance but purely one of form." This is pure assertion. No authority is cited to sustain such proposition. There was no more reason for stating "as hereinafter defined" in the 1928 Act than there would have been for stating "as hereinbefore defined" in the 1926 Act as the defined terms were in a separate subsection.

We submit that it appears to be the most reasonable explanation that in adding the phrase, Congress was giving effect to the general framework of the Act, that is, emphasizing the substantive limitations of section 101. The substantive reason why the phrase was added is (as was found by this Court in *Helvering* v. *Bliss, supra*) that section 101 related only to a base for the imposition of a tax on a portion of net income and did not relate to the question of deductibility of losses in the determination of net income.

In any event, we had supposed that it ought to be generally conceded that it is more important to follow out literally what Congress has said than to defend a particular administrative act of the Commissioner taken upon his conclusion as to the necessity for making a similar application to losses of a rule he had earlier stated only covered gains.

POINT IV.

Respondent's Analysis of the Legislative History of Section 115 (c) and Section 101 Is Inaccurate.

Respondent claims, as do appellants, that the legislative history supports the construction contended for. We submit that respondent's analysis of the legislative histories of section 115 (c) and section 101 relies upon por-

tions of the history and ignores other portions to support what is essential to respondent's whole argument, and what is not apparent on the face of the Act—that section 115(c) has a general as opposed to a specific and limited purpose and operation.

Appellant submits that starting the historical treatment with the 1924 Act, when section 115(c) had already had at least six years of history, and section 101 more than two years of history, shows respondent's foresight but also reveals a weakness in respondent's history and logic. The salient fact is that each section has a historical origin related to a *specific* purpose. Moreover, the history is such that each provision came into the Act *separately* at a time when the other provision was not in the Act. We challenge refutation of the statement that the Revenue Act of 1918 was the first Act which contained a provision comparable to section 115 and that it did not contain any provision comparable to section 101; that the Revenue Act of 1921 contained the first provision comparable to section 101 and that it did not contain any provision comparable to section 115(c). It defies successful refutation that the early histories of these sections show a complete absence of any interrelation whatsoever.

Surprisingly enough the Government has heretofore in a case it now relies upon, *Echols* v. *Commissioner*, 61 F. (2d) 191, taken this very position—that there is no interrelation between 101 and 115(c), and that this is shown by the separate origins and histories of the two sections. It was there contended by the taxpayer that the section comparable to section 115(c) should be read in conjunction with and as enlarging the provisions of the section comparable to section 101, to which the Government in its Brief there replied:

"The petitioner's suggestion (Br. 17), that Section 201 (c) [Revenue Act of 1926 and comparable to section 115(c) of the 1928 Act] was passed for the purpose of permitting deductions of capital losses in cases like this is without support. In addition to the reasons already mentioned is the fact that Section 201(c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, was in substance the same, and *at that time there were no capital gains and losses provisions.*[5]

"Moreover, these latter provisions [comparable to section 101 of the 1928 Act] found their way into the law in order to stimulate *voluntary* capital transactions, found retarded when profits earned over a series of years were taxed as a lump sum at the regular rates in the year in which sale or exchange took place. House Report No. 350, 67th Cong., 1st Sess., pp. 10-11; Senate Report No. 275, 67th Cong., 1st Sess., pp. 12-13. Section 201 (c) [comparable to section 115(c) of the Revenue Act of 1928] *has no relation to the accomplishment of that purpose,* and in view of this alone it would seem that courts should be hesitant by extension of its provisions to bring within Section 208 (a) (2) [comparable to section 101 of the 1928 Act] transactions *not clearly there by the law as written and which the latter statute was not designed to cover.*" [Government's Brief, pp. 12-13. Italics added and matter in brackets added.]

---

[5] [Footnote from Government's Brief.]

"Moreover, Section 201 (c) of the 1921 Act, c. 136, 42 Stat. 227, made no special provision for liquidating dividends, *yet it was in that Act that the capital provisions first appeared.* Section 206 of the Revenue Act of 1921.

"The provision of the 1918 Act in respect of liquidating dividends was restored in Section 201 (c) of the 1924 and 1926 Acts [comparable to section 115(c) of the Revenue Act of 1928]."

After correctly urging upon the Court in the *Echols* case, *supra*, that the purpose and object of Congress' enactment of section 101 was not inclusive of the idea of liquidation under 115(c) but only to facilitate sales, and after pointing out that this was confirmed by the legislative history, can the respondent now seriously urge upon this Court a contrary position as to the purpose, objective and legislative histories?

It would seem that the Court should be hesitant by extension of section 115(c) to bring within section 101 transactions not clearly there by the law as written, and particularly transactions which the section was not designed to cover. We submit that the same history cannot now be made by respondent to serve a different purpose—one of giving 115(c) a general operation "throughout the Revenue Acts and in section 101(c)(2)."

The background and the earliest history of section 115(c) is, we believe, impartially treated in a separate part of our Main Brief, pages 24 to 28, and further elaboration would unduly extend the discussion. The conclusion therefrom is that historically section 115(c) served solely the special purpose of placing liquidating dividends in contradistinction to ordinary dividends out of current or accumulated earnings or profits. This distinction (except for a lapse between 1921 to 1924) has been perpetuated in every Revenue Act from the year 1918 to and including the Revenue Act of 1938. This original, special and long-established purpose marks the scope of section 115(c).

When the capital gains provisions first appeared in the Revenue Act of 1921 (c. 136, 42 Stat. 227). it was then regarded as settled law that a liquidation was not a sale. *Lynch* v. *Turrish*, 247 U. S. 221, 226, and *Lynch* v. *Hornby*,

247 U. S. 339, 341. Also, the word "sale" had a well-settled meaning.*

In adding section 101 to the statute, Congress, although defining many other terms, did not indicate therein any intent to depart from the well-established meaning of sale or exchange which even the court below though holding against petitioners held in its ordinary sense excluded liquidations (*Burnet* v. *Harmel, supra*).

Applying well-recognized principles of construction, Congress is presumed to have legislated with the settled principles applicable to sales and liquidations in mind (*United States* v. *Merriam,* 263 U. S. 179, 187) and must be presumed to have used the term "sale" in its usual, ordinary, and every-day meaning (*Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 561.)

Moreover, the purpose of Congress in enacting the provisions relating to gains arising from the sale of capital

---

* See *Williamson, et al.* v. *Berry,* 49 U. S. [8 Howard] 495, 543-544, where it was held that a "sale" is a word of special legal import both at law and in equity. It means at all times a contract between parties to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold. A transfer for a consideration other than cash was not valid. In *Schutz* v. *Jordan,* 141 U. S. 213, 215, the Court aptly stated: "A party cannot be compelled to buy property which he does not wish to buy; and no trick of the vendor, conspiring with an agent of such party, by which possession is placed in him, creates on his part a contract of purchase." You cannot be forced into a "sale." In *Norfolk & West. Ry. Co.* v. *Sims,* 191 U. S. 441, 447, it was stated that a sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted, and, second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell and its acceptance. See also *Washington & Turner* v. *Ogden,* 66 U. S. [1 Black] 450, 456; *Preston* v. *Keene,* 39 U. S. [14 Peters] 133, 137; *Dahlinger* v. *Commissioner,* 51 F. (2d) 662, 663 (C. C. A. 3rd).

assets indicates that the construction for which appellant contends is correct. Prior to 1921 gains and profits representing the increased value of property were fixed as a lump sum in the year in which the property was sold and the gain realized. Thus, although this property represented the realization of a gradual appreciation of value extending over several years, the effect of the statute was to concentrate the gain and the tax in a single year. Consequently, the specter of a big surtax had the effect of inducing the owners of such property to withhold it from sale. The capital gains provisions were adopted to relieve this situation (H. R. 350, 67th Cong., 1st Sess., pp. 10-11). Congress was not trying to encourage corporate dissolutions. In view of the purpose of Congress, the statute should not be construed to cover transactions not within its purpose or within its meaning under the law at the time of its enactment.

It is a familiar rule of statutory construction that the terms used by Congress must be read in the light of, and in an endeavor to effectuate, the objects and purposes for which the statute was enacted, and that to this end the condition of affairs which led to the legislation may be considered, *American Tobacco Co.* v. *Werchmeister*, 207 U. S. 284, 293.

POINT V.

Reference to the Committee's Reports Is Inappropriate.

Respondent has introduced into the argument extended references to Committee Reports, particularly under the 1924 and 1934 Acts, discussing various provisions therein. Reference has even been made to changes inserted for the first time in the recent Revenue Act of 1938.

A. Committee Reports Under 1924 Bill.

Respondent claims (Resp. Brief, p. 12) that the Reports of the Senate Finance Committee and House Ways and Means Committee discussing section 201 (c) of the 1924 Act make it clear that corporate liquidations were to be treated as sales and exchanges of capital assets within section 203. Nothing *simpliciter* so states and nothing could be less clear.

Respondent refers first to the Senate Finance Reports although the Bill—a tax measure—originated in the House. The Report of this Committee stated that the existing law [1921 Act] had no provision in it similar to subdivision (c) of the Bill and proposed to restore a provision of the Revenue Act of 1918 (quoted in our Main Brief, pp. 24-25) with a further change reading:

> "There shall be taxed as a dividend to the distributee such an amount of the gain recognized under Section 203 as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The *remainder*, if any, of the gain recognized under Section 203 shall be taxed as a gain from the exchange of property." [House Draft of Bill.]

This addition was designed to give effect to the conclusive presumption that any distribution was out of earnings or profits (and therefore like a current dividend) to the extent thereof. To the extent earnings or profits entered into a liquidating distribution, it was proposed to let such earnings distribution be treated as an ordinary dividend subject only to the surtax. Dividends out of current earnings under both the 1918 and 1921 Acts were subject only to the surtax. After the "ordinary gain", the "remainder

gain", under the Bill, was to be taxed as the "entire gain" had been taxed under the 1918 Act—to wit, subject to both normal and surtaxes.

Read against these changes, it is obvious that the House Ways and Means Committee Report was concerned only with differentiating between current, periodic or ordinary dividends which would be subject only to the surtax and liquidating dividends which, as in the 1918 Act, were subject to both the normal and surtax. Therefore it was specifically stated in the Ways and Means Committee Report that the proposed Bill, *"as did the 1918 Act,"* treats liquidating dividends as in full payment in exchange for the stock like a sale. Treating liquidating dividends like a sale, as was done in the 1918 Act, was the only convenient analogy to differentiate them from ordinary dividends which were dealt with in the same section. No possible reference to the 12½% rate imposed in lieu of the normal and surtax was possible for this special rate was not imposed under the 1918 Act to which reference was made.

The House Bill, as it came to the Senate, had straddled on the question of the effect to be given to a liquidating dividend. As presented to the Senate Finance Committee, it was admitted that the Treasury regarded liquidating dividends the same as current, periodic or ordinary dividends and thus they were subject only to surtax rates. Neither the normal tax rates nor the 12½% rate in the section comparable to 101 imposed in lieu of both surtax and normal tax rates applied. The House had decided that the portion that was out of current earnings and profits ought to be subject only to the surtax and the part which was really a return on a person's capital should be treated as a return of the cost of his stock and when the cost was con-

sidered, any gain should be taxed at both surtax and normal tax rates. This the Senate Finance Committee and the Senate considered would lead to endless problems of administration so that it was decided, as stated in the Report, that if the Act was to be "easily administered" the distribution should have but one consequence instead of two and they decided to go back to the 1918 Act *in toto*. The Senate decided to remove from the Bill the matter quoted above. This gave the same effect of treating a liquidating dividend like a sale of the stock—that is, any profit was subject to both normal and surtaxes. This avoided the necessity of figuring out what portion of a liquidating dividend came out of accumulated earnings of the company. Everything that is said in the Committee Report is directed to contrasting the idea of "ordinary dividend" with a "liquidating dividend". It was realized that the former was a current gain, whereas the latter was a gain on a capital transaction.

In the case of capital transactions, the capital gain and loss provisions required first that the cost of the stockholder's investment be determined under a section comparable to section 113 of the Revenue Act of 1928; that the amount of the gain or loss be determined under a section comparable to section 111 and that the gain or loss be recognized in a section comparable to section 112. On the other hand, as non-capital income such as ordinary dividends was *ipso facto* a part of gross income under a section comparable to section 22 of the Revenue Act of 1928 no further provisions were necessary under the scheme of the statute.

All of the references respondent makes to the Committee Reports relate to gains. None relate to losses. This is

more than a happenstance, because a current dividend is always a gain and, therefore, in contrasting liquidating dividends (which in many cases resulted in losses) the convenient contrast was to a gain. This shows nothing as to what happens therefore in the case of losses.

Moreover respondent has quoted only from that portion of the Committee Reports which relates to section 201(c). A reading of all the matter quoted will disclose that not one mention is made of section 208. No reference has been made by respondent to the Committee Reports bearing upon section 208 of the Bill. An examination of these sections, however, will disclose that the discussion relative to section 208 makes no reference whatsoever to section 201(c). A reference to the case of *Piper* v. *Willcuts*, 64 F. (2d) 813, 815-816 (C. C. A. 8th) will disclose the clearly divergent views between the Senate and the House upon section 208. The discussion is devoid of any suggestion that liquidations were intended to be included within section 208.

We submit that there is nothing in these involved Congressional proceedings which "makes it clear", as respondent claims, that section 208 applies to liquidating dividends.

B. Section 23(k)(2) of Revenue Act of 1938.

The addition made in section 23(k)(2) of the 1938 Act is not indicative of anything concerning the provisions of section 23 or section 115(c), or section 101 of the Revenue Act of 1928, passed ten years earlier. A reference to section 23(k)(2) of the 1938 Act shows that it deals with bad debts and that the term "security" used in subdivision (2) is defined in subdivision (3) to exclude stock. Apparently the Government is confused as to the section of the 1938

Act which covers stock. The section covering stock is 23(g)(2) for the term "security" there used is defined in subdivision (3) to mean "stock".

C. Changes Made In 1934 And Later Acts In Relationship Of Former Section 101.

It will be observed upon a comparison of the provisions of the entire sections 23 and 101 of the Revenue Act of 1928 with sections 23 and 117 of the 1934 and later Acts:

(a) That unlike the 1928 Act, in the 1934 Act section 117 has been removed from Supplement A—Rates of Tax, stated to be supplementary to Subtitle B, Part I, and is now to be found in Supplement B—Computation of Net Income, Supplementary to Subtitle B, Part II.

(b) The reason for this undoubtedly is that in the 1934 Act, again unlike the Revenue Act of 1928, section 117 *no longer* is a section relating to the imposition of a tax in lieu of other taxes, but under the *revised* scheme of the Act relates solely to adjusting the concept "net income." That is why it has been shifted from one Supplement to another. The Revenue Act of 1934 for the first time removed the tax-imposing language theretofore found in both subdivisions (a) and (b) of section 101, which had stated:

"* * * there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title", etc.

Under the Revenue Act of 1938, and commencing with the Revenue Act of 1934, section 117, was removed to the Supplement bearing upon the Computation of Net Income, and now states:

"Percentage taken into consideration.—In the case of a taxpayer, other than a corporation, only

the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset *shall be taken into account in computing net income:* * * *" [Section 117(b) of the Revenue Act of 1938].

(c) Section 23 of the Revenue Act of 1928, if read in its entirety will be found to contain no cross-reference whatsoever to section 101, dealing with capital gains and found in an unrelated Supplement. On the contrary, section 23 of the Revenue Act of 1938, in view of the change discussed above, now makes specific cross-reference to section 117 because, under the revised and different scheme, section 117(a) now relates to the Computation of Net Income and not to the imposition of a tax thereon.

The subsequent history, it is submitted, rather than supporting the respondent's argument, if analyzed in its true light as explained above, supports and is entirely consistent with the appellants' position taken herein.

D. 1934 Amendment To Sections 115(c) and 117.

Respondent's references (Resp. Brief, pp. 14-15) to the provisions of the 1934 Act are inappropriate. Respondent quotes the amendment made to section 115(c) and has interpolated in brackets the statement that the section is *comparable* to section 101 of the former Acts, which statement is possibly intended to be qualified still further by Footnote 5 to the Brief. For the reasons explained above, section 117(a), while a *successor* to 101, since it relates to capital gains, is *not comparable* because it no longer relates to the imposition of a tax and has been transferred out of the Supplement relating to the imposition of tax, into the Supplement relating to the Computation of Net Income.

Naturally, since sections 115(c) and 117 are both in the same Supplement B, and both relate, since the Revenue Act of 1934, to the "Computation of Net Income" as opposed to the situation existing theretofore (when section 101 related to the imposition of a particular tax rate), in the drafting of the 1934 Act under the new scheme there adopted the addition of a sentence to make it clear that section 115(c) governed the treatment of liquidating dividends *despite* section 117(a) is entirely understandable and shows an intent to exclude in the application of that section, even in the 1934 Act, any consideration of the successor to section 101 of the 1928 Act. Also for the first time a new treatment was accorded gains or losses realized upon the retirement of obligations by virtue of the addition of subsection (f) to 117—the effect being that only a percentage of the gain or loss, depending upon the length of time held, was to be taken into account in computing net income.

E. Committee Reports Relating To 1934 Bill.

The respondent has quoted lengthy excerpts from the Committee Reports under the 1934 Revenue Bill containing self-serving declarations about the situation under the 1932 Act. In the final analysis a construction of the law is for the courts and not for the person preparing a résumé of the effect to be given to already enacted provisions. The fact is that the Report of the Senate Finance Committee quoted at length in the footnote on page 15 of Respondent's Brief is dated March 28, 1934. Appellants' claim for refund, raising the issue in this case as to the interpretation of the 1928 Act, was filed on December 15, 1932, and the same position had been taken in the return filed March 15, 1930.

The fact that an opportunity was taken in the 1934 Committee Reports to bolster the otherwise indefensible position of the Commissioner, who had decided to apply the 12½% capital tax rate to losses on liquidations as an administrative policy although the Regulations were silent upon the point is a confession of weakness. As eminent an authority as Professor Erwin N. Griswold, Professor of Law at Harvard Law School, and formerly Special Assistant to the Attorney General of the United States in charge of tax matters from 1929 to 1934, has summed up the practice of incorporating self-serving matter in Committee Reports on the tax bills as follows:

> "Statements of the latter sort, however, have recently been made in Committee Reports almost as a matter of course. As they are often in the nature of self-serving declarations it would not be surprising to find that the Courts may examine them with some skepticism." (48 Harvard Law Review 1032, 1035.)

We submit that it is a rule of construction well settled by this Court that changes made, as in the instant case, six or ten years later, in a subsequent Revenue Act, are inappropriate to the discussion. Such practice was disapproved by this Court in *Penn Mutual Life Insurance Company* v. *Lederer*, 252 U. S. 523, where Mr. Justice Brandeis in delivering the opinion of the Court upon a construction of the 1913 Act concluded (pp. 537-538):

> "In support of the company's contention that the interpolation of the words 'within the year' is necessary in order to support the construction given to the act by the Circuit Court of Appeals we are asked to consider the legislative history of the

> Revenue Act of 1918 (enacted February 24, 1919, c. 18, 40 Stat. 1057); and specifically to the fact that in the bill as introduced in and passed by the House, the corresponding section (233 (a)) contained the words 'within the taxable year' and that these words were stricken out by the Conference Committee (Report No. 1037, 65th Cong., 3d sess.) The legislative history of an act may, where the meaning of the words used is doubtful, be resorted to as an aid to construction. *Caminetti* v. *United States*, 242 U. S. 470, 490. *But no aid could possibly be derived from the legislative history of another act passed nearly six years after the one in question.* Further answer to the argument based on the legislative history of the later act would, therefore, be inappropriate." [Italics added.]

Since it is a fact of common knowledge that the Revenue Acts are changed almost from year to year, it is a considerable imposition upon taxpayers to have to defend against the imposition of what they consider unjust exactments by litigating the entire gamut of Revenue Acts after as well as before the particular statute applicable to a given case.

We have endeavored out of deference to the Government's contentions to show that there are good and sufficient explanations both for what has been said in the Committee Reports and for the various changes in succeeding Revenue Acts to which respondent has adverted and with respect to which Congress deemed it necessary to make changes from time to time. We believe, however, that such discussion is clearly inappropriate to the question for decision.

POINT VI.*

In Number 97 the Refund Claim Is Valid for the Full Amount.

The Government has raised in its answering brief the additional defense in No. 97, which the Court of Claims below did not find it necessary to consider, to the effect that any refund in excess of $127.64, with interest thereon, of the tax paid by the Estate of William A. White for 1929, is barred by the statute of limitations, section 322 of the Revenue Act of 1928.

Sections 321 and 322(a) provide:

> "SEC. 321. OVERPAYMENT OF INSTALLMENT.
>
> If the taxpayer has paid as an installment of the tax more than the amount *determined* to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount *determined* to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.
>
> "SEC. 322. REFUNDS AND CREDITS.
>
> (a) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, *and any balance shall be refunded immediately to the taxpayer.*" [Italics added.]

---

* Respondent's brief, Point III, injects a new issue not considered in our main brief. See explanation in footnote, page 2 of main brief. As there stated petitioners submit this point upon the argument herein without oral argument.

Respondent has omitted to quote the first sentence of section 321 and left out (a) of 322 which is "Authorization." We urge first that "determine" is not restricted merely to the action of the Commissioner. "Determine" means also a definitive adjudication. If the Commissioner thought the correct tax liability was $2,783.47 but it is adjudicated to be $2,337.41, then his determination does not prevail over this Court's.

Next, section 322(a) is a direction that any overpayment (where no other taxes are due the Government) shall be immediately refunded. If it is determined by this Court that the loss on liquidation is fully deductible the correct tax liability is admittedly $2,337.41 and everything after receipt of such sum was immediately refundable.

Therefore, it appears that the Commissioner's action was correct in voluntarily paying back $757.64—it was not barred at December 31, 1931—at the time he made an "immediate refund to the taxpayer" under section 322 (a). The Commissioner was in error, however, in not refunding the further sum of $446.06 if it be determined by this Court that the loss on liquidation is fully deductible. To protect against the bar of the statute under section 322(b) upon the Commissioner's refusal to refund the further sum of $446.06, a claim for refund was made for the balance of the December 15, 1930 payment due if this Court's determination sustains petitioners' claim.

Blair v. *Birkenstock*, 271 U. S. 348, settled the manner of computing interest on overpayments where the original

payments had been made in installments. An analysis of the case follows:

BIRKENSTOCK CASE

Date	Return	Corrected	Refund Overpayment
Tax Year 1919:			
Tax Liability	$88,956.92	$53,890.07	
Payments 1920:			
3/15	$22,239.23	$22,239.23	
6/15	22,239.23	22,239.23	
9/27	22,239.23	9,423.61	$12,815.62*
12/15	22,239.23		22,239.23**
	$88,956.92	$53,902.07	$35,054.85
1923:			
5/18	Claim for refund	$35,054.85	
		$88,956.92	
1924:			
5/19	Refund made		35,054.85

The Court merely held that interest ran on $12,815.62 [*] from 9/27/20 and on $22,239.23 [**] from 12/15/20. The Court refused to follow the argument that interest should be computed on the excess of each quarterly payment from the several dates of payment. The *ratio decidendi* was that the overpayment of an installment is applied to the unpaid balance of tax due, as a payment on account; only when the full tax liability has been satisfied is there any overpayment to be refunded.

An analysis of the facts in No. 97 upon the same basis used in *Blair* v. *Birkenstock, supra,* will show that the full $446.06 may be validly refunded:

Date		Return	First Refund Corrected	First Refund Overpayment	Second Refund Corrected	Second Refund Overpayment
Tax Year 1929:						
Tax Liability		$3,541.11	$2,783.47		$2,337.41	
Payments 1930:						
3/15		$ 885.28	$ 885.28		$ 885.28	
6/14		885.28	885.28		885.28	
9/15		885.27	885.27		566.85	$ 318.42
12/15		885.28	127.64	$757.64		885.28
		$3,541.11	$2,783.47	$757.64	$2,337.41	$1,203.70
1931:						
12/31	Voluntarily Refund by Government			$757.64		757.64
						$ 446.06
1932:						
12/15	Claim for refund filed for					$ 446.06

A determination by this Court in petitioners' favor upon the substantive issue will result in a correct tax liability of $2,337.41. This will be a "determination" under section 321. The Commissioner's action on 12/31/31 was proper in refunding the $757.64 but erroneous in failing to refund an additional $446.06. Every sum in excess of $566.85 paid on 9/15/30 constituted an overpayment immediately refundable. When the $757.64 was refunded, nothing in section 322(b) limited the repayment and as to this the Commissioner performed his duty. Since an overpayment under section 322 is directed to be refunded immediately, the first refund is allocated against the first overpayment. So doing leaves a balance of $446.06 which the Commissioner erroneously refused to refund, for which a claim was duly and timely filed on 12/15/32, thus preventing the operation of any of the provisions in section 322(b).

We submit that the respondent's argument amounts to a contention that the Commissioner may *determine* the correct tax liability to the exclusion of the Courts as to any

voluntary repayment and that in so far as he makes a voluntary refund he can in effect deny to the taxpayer the right, to have, once he has fully paid his tax, an immediate refund of any overpayment as provided by the statute.

CONCLUSION

The decision below should be reversed.

In No. 97 the claim filed on December 15, 1932 is timely for the full amount of $446.06.

Respectfully submitted,

JOHN P. OHL,
CHARLES C. PARLIN,
JOHN W. FROST,
Attorneys for Plaintiff,
63 Wall Street,
New York, N. Y.

Dated: New York, N. Y., November 14, 1938.

BLANK PAGE

BLANK PAGE

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, PETITIONERS

v.

THE UNITED STATES

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

We do not oppose the granting of writs of certiorari in these cases. The petition is based chiefly upon a conflict between the decision below and that

of the Circuit Court of Appeals for the Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, decided June 2, 1938, 97 F. (2d) 31. The Government will file a petition for certiorari in the *Weaver* case on the ground, among others, of a conflict between that decision and the instant cases.

The Court of Claims upheld the Commissioner's determination that the loss sustained by Alexander M. White and the estate of William A. White, upon the distribution of a liquidating dividend of $5 on each share of preferred stock in Del-Bay Farms, Incorporated, could be deducted only as provided in Section 101 (b) of the Revenue Act of 1928, c. 852, 45 Stat. 791, which limits the diminution in income tax to 12½% of capital net loss. Section 101 (c) (2) of the 1928 Act provides that " 'Capital loss' means deductible loss resulting from the sale or exchange of capital assets." The court ruled that this definition in terms of sale or exchange embraces losses resulting from the receipt of liquidating dividends, in view of Section 115 (c) of the 1928 Act, which provides that "Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, * * *"

In the *Weaver* case, the Circuit Court of Appeals for the Ninth Circuit held that losses resulting from the receipt of liquidating dividends are not covered by Secton 23 (r) (1) of the 1932 Act, c. 209, 47 Stat. 169, which provides that "Losses from sales or exchanges of stocks and bonds * * *

which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges * * *." That court declined to interpret Section 23 (r) in the light of Section 115 (c)[1] and stated that the latter section "does not say a liquidating distribution is an 'exchange', but says it 'shall be treated' as such for the purpose of applying §§ 111 and 112." It held the loss deductible as an ordinary loss by virtue of the general provisions relating to the taxability of corporate distributions.[2]

Although the two decisions involve different sections of the revenue laws, we agree that they are in substantial conflict. Both cases turn upon the question whether distributions in liquidation are subject to provisions governing losses resulting from a *sale or exchange* of assets—the *Weaver* case involving stocks held less than two years, and therefore not capital assets, and the present cases involving capital assets. The Court of Claims employed Section 115 (c) in order to determine the coverage of Section 101. The Court of Appeals for the Ninth Circuit apparently held that Section 115 (c) can be applied only in conjunction with Sections 111 and 112, to which it refers,[3] notwithstanding the dissent of Circuit Judge Stephens,

[1] Section 115 (c) of the 1928 Act was retained without change in the 1932 Act.

[2] Sections 22 (d), 112, and 115 (c) of the 1932 Act, in so far as relevant, are reenactments of the same sections of the 1928 Act.

[3] The court also invoked general canons of construction, but these do not seem to constitute the crux of the decision.

who cited the opinion of the Court of Claims in the present cases, and stated that the phrasing of Section 115 (c) "shows an intent to settle for tax purposes the somewhat anomalous character of a liquidation distribution transaction as a sale or exchange of the stock for the amount distributed."

The Revenue Act of 1934, c. 277, 48 Stat. 680, made radical changes in the treatment of capital gains and losses, but Section 115 (c) remains unchanged, in so far as losses resulting from distributions in liquidation are concerned, and the question whether liquidating dividends shall be treated as received upon an exchange within the meaning of sections of the statute other than those mentioned in Section 115 (c) will doubtless continue to arise. In fact, the question whether such a loss is deductible in full or whether it is limited by Sections 23 (j) and 117 (d) of the 1934 Act, which allow losses from the sales or exchanges of capital assets only to the extent of $2,000 plus the gains from such sales or exchanges, is now pending before the Circuit Court of Appeals for the Ninth Circuit in the case of *Martin General Agency* v. *Commissioner,* on appeal from the Board of Tax Appeals, whose memorandum opinion, not reported, was rendered August 19, 1937.

They were not invoked by the court below, in view of its decision on the clear meaning of Sections 101 (c) (2) and 115 (c).

If certiorari is granted, the Government intends to raise the additional defense, which the court below did not find it necessary to consider, in No. 97, brought by the sole surviving executor of the estate of William A. White, to the effect that any refund in excess of $127.64, with interest thereon, of the taxes paid by the estate of William A. White for the year 1929, is barred by the statute of limitations, Section 322 of the Revenue Act of 1928.[4]

It is therefore believed that the question involved merits review by this Court, and we, accordingly, do not oppose the petition for writs of certiorari.

Respectfully submitted.

N. A. TOWNSEND,
Acting Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

AUGUST 1938.

---

[4] The last installment of the tax for the year 1929 shown as due on the income tax return of the estate of William A. White was paid on December 15, 1930, in the amount of $885.28. On December 31, 1931, $757.64 and interest was refunded to the estate by the Commissioner of Internal Revenue. Claim for refund for $446.06, the amount sought to be refunded in this suit, was filed on December 15, 1932. This claim was timely only as to the last installment of the tax. Since $757.64 of this installment had already been refunded, only $127.64 can be recovered in the event the Court should decide that the petitioner in No. 97 is entitled to recover. *Blair* v. *Birkenstock*, 271 U. S. 348.

U. S. GOVERNMENT PRINTING OFFICE: 1938

BLANK PAGE

BLANK PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Statutes and regulations involved	4
Summary of Argument	4
Argument: The taxpayers' losses upon the corporate liquidation were capital losses in 1929 within section 101 of the Revenue Act of 1928	5
I. Losses on corporate liquidation are capital losses within section 101 (c) (2)	6
A. A corporate liquidation is a "sale or exchange" within the words of section 101 (c) (2)	7
B. Treasury regulations require treatment of the losses as capital losses	9
C. The legislative history of sections 115 (c) and 101 supports the respondent's construction	11
D. Losses, as well as gains, on corporate liquidations are within section 101	12
II. The taxpayers' losses are not deductible under sections 112 and 23 (e) apart from sections 101 and 115 (c)	16
A. Sections 115 (c) and 101 are not mutually exclusive	16
B. Congress, by reenactment of sections 201 (c) and 208 of the 1924 Act, did approve Article 1545 of Regulations 65	19
C. The respondent's construction of section 115 (c) is not contrary to its history and purpose	20
D. The respondent's construction does not involve a harsh or absurd result	23
III. In No. 97 recovery is limited in any event to $127.64 with interest because the refund claim was filed too late with respect to any additional amount	25
Conclusion	30
Appendix	31

CITATIONS

Cases:	
Blair v. *Birkenstock*, 271 U. S. 348	26
Brewster v. *Gage*, 280 U. S. 327	11
Broderick v. *Anderson*, 23 F. Supp. 488	26

107408—38——1

Cases—Continued. Page

Burnet v. *Harmel*, 287 U. S. 103 19
Childs v. *Commissioner*, 35 B. T. A. 1125 ..... 7, 8
Echols v. *Commissioner*, 61 F. (2d) 191 ..... 7, 24
Harr v. *United States*, 20 F. Supp. 206 26
Hellmich v. *Hellman*, 276 U. S. 233 ..... 7, 8
Helvering v. *Bliss*, 293 U. S. 144 ..... 11, 22
Helvering v. *City Bank Co.*, 296 U. S. 85 11
Helvering v. *Twin Bell Syndicate*, 293 U. S. 312 24
Helvering v. *Winmill*, No. 11, present term, decided November 7, 1938 11
Lang v. *Commissioner*, 289 U. S. 109 24
Langstaff v. *Lucas*, 9 F. (2d) 691, affirmed, 13 F. (2d) 1022, certiorari denied, 273 U. S. 721 ..... 7, 8
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 488 11
McFeely v. *Commissioner*, 296 U. S. 102 ..... 11, 19
McKee et al., Trustees v. *Commissioner*, 35 B. T. A. 239 19
New Colonial Co. v. *Helvering*, 292 U. S. 435 24
Piper v. *Willcuts*, 64 F. (2d) 813 13
Universal Battery Co. v. *United States*, 281 U. S. 580 11
United States v. *Fairbanks*, 95 F. (2d) 794, certiorari denied, No. 65, October 10, 1938 ..... 18, 19
Weaver Co. v. *Commissioner*, 97 F. (2d) 31, now pending on writ of certiorari, No. 304 6

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057:
Sec. 250 27
Sec. 252 27

Revenue Act of 1921, c. 136, 42 Stat. 227:
Sec. 206 11

Revenue Act of 1924, c. 234, 43 Stat. 253:
Sec. 201 36
Sec. 208 37
Sec. 1019 27

Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 201 37
Sec. 208 37

Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 11 31
Sec. 12 31
Sec. 13 17
Sec. 21 31
Sec. 22 31
Sec. 23 32
Sec. 56 27
Sec. 57 27
Sec. 101 32

Statutes—Continued. Page

Sec. 111 35
Sec. 112 36
Sec. 115 36
Sec. 321 ..... 27, 28
Sec. 322 26
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 101 9
Sec. 115 9
Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 115 14
Sec. 117 14
Revenue Act of 1938, Pub., No. 554, 75th Cong., 3d Sess.,
Sec. 23 23
Miscellaneous:
House Report No. 179, 68th Cong., 1st Sess., p. 11 12
House Report No. 704, 73d Cong., 2d Sess., p. 30 15
Senate Report No. 398, 68th Cong., 1st Sess., p. 11 12
Senate Report No. 558, 73d Cong., 2d Sess., p. 37 15
Treasury Regulations 65, Art. 1545 10
Treasury Regulations 69, Art. 1545 10
Treasury Regulations 74, Art. 625 ..... 9, 38
Treasury Regulations 77:
Art. 125 10
Art. 625 12
Art. 1545 4
Tyler and Ohl, *The Revenue Act of 1934*, 83 U. Pa. L. R.
607 (1935) 13

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, PETITIONERS

v.

THE UNITED STATES

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims for the United States is reported in 21 F. Supp. 361 (R. 37–47).

JURISDICTION

The judgments of the Court of Claims were entered December 6, 1937 (R. 47–48). Motions for a new trial were overruled on March 7, 1938 (R. 48). A petition for writs of certiorari was filed on June 7, 1938 (R. 48), and was granted on October 10, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether stockholders' losses in a corporate liquidation upon their stock held more than two years are ordinary losses under section 23 of capital losses under section 101 of the Revenue Act of 1928.

2. In No. 97, whether the refund claim was filed too late to recover any amount in excess of $127.64.

STATEMENT

The facts in the two cases are identical except as to the amounts of the losses, and are contained in the special findings of fact of the court below (R. 37–44), which may be summarized as follows:

Prior to March 17, 1927, Alexander M. White paid $110,000 for $110,000 face amount of the bonds of the Seabrook Company and William A. White paid $50,000 for $50,000 face amount of these bonds (R. 41). In 1925 the Seabrook Company's name was changed to Del-Bay Farms, Inc., hereinafter referred to as the New Jersey corporation. Pursuant to a plan of reorganization Alexander M.

White acquired 1,100 shares of preferred stock of Del-Bay Farms, Inc., a Delaware corporation, in exchange for his bonds of the New Jersey corporation of the same name; and the estate of William A. White received 500 shares of the same stock for its bonds of the New Jersey corporation (R. 41, 43).

On April 11, 1929, the Delaware corporation was dissolved, its activities ended, and its office closed. Following this a liquidating dividend of $5 was paid on each share of preferred stock, whereupon such stock became worthless. Upon the complete liquidation of the Delaware corporation Alexander M. White sustained a loss of $104,500, and the estate of William A. White a loss of $22,500 (R. 43–44).

The petitioners deducted the above losses in full in their returns for the year 1929. The Commissioner determined that the losses were subject to the "capital net loss" provisions of the 1928 Act and found deficiencies, which were paid. Claims for refund were filed and rejected (R. 38–41). Suits were instituted in the Court of Claims, which upheld the determination of the Commissioner.

In No. 97 the last installment of the tax for the year 1929 shown as due on income tax return of the estate of William A. White was paid on December 15, 1930, in the amount of $885.28. On December 31, 1931, $757.64 and interest was refunded to the estate by the Commissioner of Internal Revenue (R. 40). Claim for refund of $446.06, the amount sought to be refunded in this suit, was filed on December 15, 1932 (R. 41).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 31–38.

SUMMARY OF ARGUMENT

I. The taxpayers' losses in the corporate liquidation upon their stock held for more than two years were capital losses because a corporate liquidation is a "sale or exchange" within section 101 (c) (2) of the Revenue Act of 1928. Section 115 (c), providing that amounts "distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock," requires the determination that a corporate liquidation is a "sale or exchange." Treasury Regulations (Regulations 77, Article 1545), approved by Congress by re-enactment of sections 101 and 115 (c), require treatment of these losses as capital losses. The legislative history of sections 101 and 115 (c) supports this view that losses and gains on corporate liquidations are within section 101.

II. Losses upon corporate liquidations are not deductible, as the taxpayers contend, under sections 23 (e) and 112, apart from sections 101 and 115 (c). The entire plan of the 1928 Act requires the conclusion that sections 23 (e), 101, and 115 (c) are not mutually exclusive but are interdependent. This construction does not involve, as the taxpayers contend, a harsh or absurd result.

III. In No. 97 recovery is limited in any event to an alleged overpayment of $127.64 on December

15, 1930, because the refund claim filed on December 15, 1932, is untimely with respect to any additional amount.

ARGUMENT

THE TAXPAYERS' LOSSES UPON THE CORPORATE LIQUIDATION WERE CAPITAL LOSSES IN 1929 WITHIN SECTION 101 OF THE REVENUE ACT OF 1928

In 1929 the taxpayers, upon the complete liquidation of a corporation, received a dividend and realized losses on their preferred stock in the corporation which they had received pursuant to a plan of reorganization in exchange for bonds of another corporation which they had held since 1925. It is not disputed that within section 101 (c) (8) of the Revenue Act of 1928 the preferred stock was capital assets, held for a period of more than two years, which is determined by including the period for which the bonds were held by the taxpayer. The only question is whether the corporate liquidation was a "sale or exchange of capital assets" within section 101 (c) (2).

The taxpayers deducted their entire losses on the preferred stock in their 1929 income tax returns. The Commissioner of Internal Revenue (R. 18–19) and the court below (R. 45–47) determined that the loss of each taxpayer was a "capital loss * * * resulting from the sale or exchange of capital assets" within section 101 (c) (2) and deductible under 101 (b) only to the extent of a deduction of 12½ per centum of the "capital net loss" from the

partial tax computed upon the ordinary net income as if section 101 had not been enacted. The taxpayers' petition for certiorari, granted October 10, 1938, asserts a conflict with *Chester N. Weaver Co.* v. *Commissioner*, 97 F. (2d) 31 (C. C. A. 9th), No. 304, present term, pending on certiorari granted October 10, 1938, to be argued immediately after this case.

The taxpayers contend that a loss upon a corporate liquidation is not a capital loss upon a "sale or exchange of capital assets" within section 101 (c) (2) and that their entire losses on the corporate liquidation are deductible under section 23 (e) as losses sustained by individuals within the taxable year. The respondent contends (I) that losses upon a corporate liquidation are capital losses deductible under the limitations of section 101 (b), and (II) that the authorities cited by the taxpayers do not support their contention that these losses are not capital losses.

I

LOSSES ON CORPORATE LIQUIDATION ARE CAPITAL LOSSES WITHIN SECTION 101 (c) (2)

The decision of the court below that losses on corporate liquidations are capital losses is supported by (A) the decisions applying section 115 (c) and treating a corporate liquidation as the sale or exchange of stock; (B) the Treasury regulations; and (C) the legislative history of sections 101 and 115 (c).

A. *A corporate liquidation is a "sale or exchange" within the words of section 101 (c) (2)*

Section 101 (c) (2) provides:

> "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

Section 115 (c) provides in part:

> *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

The decisions applying section 115 (c) hold that corporate liquidations shall be treated as what they in effect are—sales of stock to the corporations in liquidation, taxable in like manner as if the stockholders had sold their stock to third persons. *Hellmich* v. *Hellman*, 276 U. S. 233, 237; *Langstaff* v. *Lucas*, 9 F. (2d) 691, 694 (W. D. Ky.), affirmed, 13 F. (2d) 1022 (C. C. A. 6th), certiorari denied, 273 U. S. 721; *Mary S. Childs* v. *Commissioner*, 35 B. T. A. 1125, 1127; cf. *Echols* v. *Commissioner*, 61 F. (2d) 191 (C. C. A. 8th).

In the *Hellmich* case this Court rejected the taxpayers' contention that gain on amounts dis-

tributed to them as stockholders in a corporate liquidation out of earnings after February 28, 1933, were "dividends" under sections 201 (a) and 216 (a) of the 1918 Act for the purpose of the credit allowed in respect of the normal tax and held that the amounts distributed were not "dividends" but were payments in exchange for stock under section 201 (c), similar to section 115 (c) of the 1928 Act, and were subject to the normal tax as other gains or profits. The opinion of the Court, by Mr. Justice Sanford, states at page 237:

> The gains realized by the stockholders from the distribution of the assets in liquidation were subject to the normal tax in like manner as if they had sold their stock to third persons.

Similarly in the present case the taxpayers' contention that losses on the corporate liquidation were deductible under section 23 (e) and were not capital losses under sections 115 (c) and 101, must fail.

In the *Langstaff* case the District Court, reaching the same result which this Court later reached in the *Hellmich* case, said at page 694:

> This section [201 (c) of the 1918 Act] strips distributions made to stockholders in liquidation of the corporation of all disguises and declares that they shall be considered for what they in effect are—purchases of all their outstanding stock by the liquidating corporations, and not dividends as generally

understood, and as defined in section 201, subsection (a), and as used in section 216.

The Circuit Court of Appeals affirmed upon the reasoning of the District Judge and stated (13 F. (2d) 1022) that the amount distributed in liquidation "became the proceeds of the sale of Langstaff's stock in the corporation, instead of a corporate dividend."

In *Mary S. Childs* v. *Commissioner, supra,* the Board upheld taxpayer's contention that in view of sections 115 (c) and 115 (f) of the 1932 Act the gain on redemption of preferred stock held more than two years, considered as a partial liquidation, was capital gain within section 101 (c) (1), similar to section 101 (c) (1) of the 1928 Act here involved.

It is submitted, therefore, that for tax purposes liquidations are in effect "sales or exchanges" of stock within the meaning of that phrase throughout the Revenue Acts and in section 101 (c) (2). Nothing in the language of section 101 (c) (2) indicates that the phrase has a different or more restricted meaning than that required by section 115 (c).

B. *Treasury Regulations require treatment of the losses as capital losses*

Treasury Regulations 74, Article 625 (1928 Act), *infra,* p. 38, provide in part:

> Any gain to the shareholder [resulting from a distribution in liquidation of a cor-

poration] may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in Section 101 and Articles 501–503.

The Commissioner of Internal Revenue in the present case relied on the fact that under the regulations gains upon corporate liquidations could be taxed, at the taxpayer's option, at the flat capital gain rate, in determining that losses on corporate liquidations are subject to the complementary provisions with respect to capital losses (R. 45–47).

This regulation, pursuant to section 115 (c), correctly treats a corporate liquidation as a "sale or exchange of capital assets" within section 101 (c) (1) for purposes of permitting taxpayers the option of being taxed at the flat capital gain rate. Identical provisions were contained in Article 1545 of Regulations 65 and 69 and Article 125 of Regulations 77, with relation to sections 201 (c) and 208 of the Revenue Acts of 1924 and 1926 and sections 115 (c) and 101 of the 1932 Act, similar to sections 115 (c) and 101 of the 1928 Act.[1] The court below correctly held that this repeated reenactment of sections 201 (c) and 208 of the 1924 Act, consistently interpreted in the administrative regulations as giving the taxpayer the option to have gains on corporate liquidations taxed as gains on the "sale or exchange of capital assets", constitutes definite

[1] Identical provisions are not found in the regulations with respect to the 1921 and earlier Acts and the 1934 and later Acts because the statutory provisions in those Acts are different.

Congressional approval of the respondent's construction of sections 115 (c) and 101 of the 1928 Act. *Helvering* v. *Winmill*, No. 11, present term, decided November 7, 1938, pamph., p. 3; *McFeely* v. *Commissioner*, 296 U. S. 102; *Helvering* v. *Bliss*, 293 U. S. 144, 151; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583–585; *Brewster* v. *Gage*, 280 U. S. 327, 337.

C. *The legislative history of sections 115 (c) and 101 supports the respondent's construction*

The respondent submits that in view of section 115 (c), a corporate liquidation is so plainly a "sale or exchange" of capital assets within section 101 on the face of the statute that recourse to legislative history to support a different construction would not be available. *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89. The legislative history, however, supports the respondent's construction and may be considered for that purpose.

The provisions of sections 115 (c) and 101 first appeared together in the same statute in sections 201 (c) and 208 of the Revenue Act of 1924. Section 208 (c) for the first time, by a provision complementary to the 12½ per cent tax on capital gains, limited the deduction of capital losses to a deduction of 12½ per cent of the capital net loss from the partial tax computed on ordinary income.[2]

[2] Section 206 of the 1921 Act contained the first provisions for taxing capital gains at the flat rate but no limitation on the deduction of capital losses and no provision, similar to

The reports of the Senate Finance Committee and the House Ways and Means Committee, discussing section 201 (c) of the 1924 Act, make it clear that corporate liquidations were to be treated as sales and exchanges of capital assets, within section 208.[8]

D. *Losses, as well as gains, on corporate liquidations are within section 101*

The Treasury Regulations (Regulations 77, Article 625) expressly provide, and the legislative

---

115 (c) of the 1928 Act, for the treatment of corporate liquidations.

[8] The report of the Senate Committee on Finance (Report No. 398, 68th Cong., 1st sess.) states at p. 11:

"* * * The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the sale of property *which may be treated as a capital gain.* The treatment of liquidating dividends under the bill is substantially the same as provided for in the revenue act of 1918. A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. *Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the act* and, furthermore, is the only method of treating such distributions which can be easily administered." [Italics supplied.]

The report of the House Ways and Means Committee (Report No. 179, 68th Cong., 1st sess.), at p. 11, states:

"Section 201 (c):

"(1) The existing law has no provision similar to subdivision (c) of the bill, but the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The proposed bill, as did the 1918 act, treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution."

history of sections 115 (c) and 101 clearly discloses, that the gains upon corporate liquidations are capital gains if the stock was held for more than two years. Section 101 (c) (1) defines a capital gain as a taxable gain from the "sale or exchange of capital assets." Section 101 (c) (2), using the same words, defines capital loss as a deductible loss resulting from the "sale or exchange of capital assets." The provisions are inseparable. If a corporate liquidation is a "sale or exchange of capital assets" for purposes of gain within section 101 (c) (1) it must be a "sale or exchange of capital assets" for purposes of loss within section 101 (c) (2). The opposite result, if it were adopted despite the words of the statute, would do violence to the plan of the statute and defeat the plain intention of Congress in the 1928 and similar Acts that since capital gains may be taxed at a flat rate capital losses should be correspondingly limited.[4]

---

[4] Under the 1921 Act which permitted taxation of capital gains at the flat rate but did not limit deductions of capital losses these losses were deducted *in toto* even against ordinary income. Congress corrected this situation by limiting capital losses in section 208 (c) of the 1924 Act, similar to section 101 (b) of the 1928 Act. *Piper* v. *Willcuts*, 64 F. (2d) 813, 815–816 (C. C. A. 8th); George Tyler and John Ohl, *The Revenue Act of 1934*, 83 U. Pa. L. R. 607, 614 (1935). The taxpayers' present contention that the limitation fails to extend to losses in corporate liquidations on stock held more than two years cannot prevail in view of section 115 (c).

Indeed, a corporate liquidation involving stock held for more than two years was so clearly considered to be a "sale or exchange of capital assets" under the capital gains and losses provisions of the 1932 and prior Acts that when Congress wished to deny the benefit of the capital gains provisions to gains upon corporate liquidations, in view of the use of liquidations as a device to avoid surtaxes on corporate distributions, it was required to add expressly to section 115 (c) of the 1934 Act the following limitation:[4]

> Despite the provisions of section 117 (a) [the capital gains and losses section in that Act comparable to section 101 of the former Acts], 100 per centum of the gain so recognized shall be taken into account in computing net income.

The report of the Senate Committee on Finance, discussing the change, recognized that under the 1932 Act a corporate liquidation involving stock held for more than two years was treated in the same manner as a sale of stock to which the capital gains and losses provisions were applicable. One example (Case 3) given in the report, illustrating the difference in treatment of corporate liquida-

---

[4] In section 117 of the 1934 Act Congress substituted for the flat rate of tax on capital gains and the corresponding deduction of capital losses from the partial tax computed on ordinary income the different method of graduated percentages of gain or loss, recognized on the sale or exchange of capital assets, to be taken into account in computing net income at the ordinary rates.

tions under the 1934 and 1932 Acts expressly states that a loss upon a corporate liquidation involving stock held for more than two years is a capital loss under the 1932 Act.*

---

* Report of the Committee of Finance of the Senate (Rep. No. 558, 73d Cong., 2d Sess., p. 37):

> Under existing law [1932 Act similar to the 1928 Act here involved], a distribution in liquidation of a corporation is treated in the same manner as a sale of stock. This rule has serious objections, as it permits wealthy stockholders to escape surtax upon corporate earnings or profits distributed in the form of liquidating dividends. For instance, a corporation may have a surplus of $1,000,000. If the surplus is distributed as an ordinary dividend it is subject to the surtax rates in the hands of the shareholders. If it is distributed as a liquidating dividend it is subject only to the flat capital gain rate of 12½ percent in case the shareholder has held his stock for more than 2 years.
>
> * * * * * * * * * * * * The following examples illustrate the differences in the method of treating liquidating dividends under the 1932 Act and under the bill [1934 Act]:
>
> Distribution in liquidation—Stock held 3 years.
>
> * * * * *

	Corporation A	Corporation B
Case 3:		
Cost of stock to shareholder	$10,000	$10,000
Amount distributed in liquidation	12,000	5,000
Gain or (loss) on liquidation	2,000	(5,000)

> Shareholder reduces tax by 12½ percent of capital net loss of $3,000 (under 1932 act).
>
> Shareholder includes $2,000 (full gain on liquidation) in gross income and is entitled to a deductible loss of $2,000 (60 percent of $5,000 loss is $3,000, or $1,000 more than gain; amount of loss only up to amount of gain is allowed (under the bill).

The same example is given in the Report of the House Committee on Ways and Means (Rep. No. 704, 73d Cong., 2nd sess., p. 30).

The respondent submits, in conclusion of this point, that the statute on its face, the Treasury Regulations, approved by reenactment of the statute, and the legislative history of sections 101 and 115 (c), make it very plain that a corporate liquidation involving stock held more than two years is a "sale or exchange of capital assets," not only for the purposes of capital gains within section 101 (c) (1) but also for the purpose of capital losses within section 101 (c) (2).

II

THE TAXPAYERS' LOSSES ARE NOT DEDUCTIBLE UNDER SECTIONS 112 AND 23 (e) APART FROM SECTIONS 101 AND 115 (c)

The taxpayers contend (A) that a corporate liquidation is not a "sale or exchange" of capital assets within section 101 and that sections 101 and 115 (c) are mutually exclusive and are not to be read together (Petitioners' Brief, Points I and II, pp. 9–22); (B) that reenactment of sections 202 (c) and 208 of the 1924 Act is not a Congressional approval of the Treasury Regulations to the extent of an approval of a treatment of losses upon a corporate liquidation as capital losses (Brief, Point III, pp. 22–24); (C) that the respondent's contention is contrary to the history of section 115 (c) and fails to apply section 23 (e) (Brief, Points IV and V, pp. 24–30).

A. *Sections 115 (c) and 101 are not mutually exclusive*

1. The argument that sections 101 and 115 (c) are mutually exclusive, and that this result is sup-

ported by the second sentence of section 115 (c), is contrary to the entire scheme of the Revenue Act and makes the fundamental error of merging and confusing the separate and distinct questions of determination of amount of loss under section 111, recognition of loss under section 112, deductibility of the loss under section 23, and the treatment of deductible losses, if they are capital losses, under section 101. The second sentence of 115 (c) provides:

> The gain or loss to the distributee resulting from such exchange [corporate liquidation] shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

An examination of the plan of the statute discloses the taxpayers' error. Sections 11, 12, and 13 levy a tax for each taxable year on the net income of every individual and corporation. Section 12, levying a surtax on the net income of individuals, expressly refers in subsection (c) to section 101 for the rate and computation of tax on capital net gains. Section 21 provides that net income means gross income computed under section 22 less the deductions allowed by section 23.

Section 22 (d) provides that distributions by corporations shall be taxable to the shareholders as provided in section 115. Section 115 (c) provides that amounts distributed in liquidations shall be treated as the full payment in exchange for the stock and the gain or loss shall be determined un-

der section 111 and recognized to the extent provided in section 112. Recognition of a loss under section 112 is not a determination that the loss is deductible but is merely a determination that the taking account of a deductible loss in computing net income is not to be postponed until a later year. The question whether the recognized loss is of a type which Congress permits to be deducted is determined under section 23. And if the loss is within the type of loss permitted by section 23, the question remains whether it is a capital loss which may be deducted only to the extent and in the manner provided in section 101. The statute makes it clear that sections 23 and 101 are interdependent. Section 101 (c) (2) defines capital loss as a "*deductible* loss resulting from the sale or exchange of capital assets." Moreover, section 101 expressly refers to section 23 and further provides in part:

> (3) "Capital deductions" means such deductions as are allowed by Section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.
>
> (4) "Ordinary deductions" means the deductions allowed by Section 23 other than capital losses and capital deductions.
>
> (8) "Capital assets" means property held by the taxpayer for more than two years * * *.

2. Cases cited by the taxpayers such as *Burnet* v. *Harmel*, 287 U. S. 103; *United States* v. *Fairbanks*, 95 F. (2d) 794 (C. C. A. 9th), certiorari denied,

No. 65, present term, October 10, 1938; and *McFeely* v. *Commissioner*, 296 U. S. 102, plainly have no application because they do not involve corporate liquidations or the application of section 115 (c).

In *United States* v. *Fairbanks*, *supra*, it was held, in the absence of a provision with respect to bonds similar to section 115 (c) with respect to stock, that the redemption and the retirement of bonds constituted neither a sale nor an exchange of capital assets but payment, pursuant to call, of a fixed corporate obligation in accordance with its terms. The distinction between that case and the present case, involving section 115 (c), is emphasized by the fact that when Congress wished to change the rule and make redemption of bonds a sale or exchange, in order to avoid a different treatment upon a sale and upon redemption (*John D. McKee et al., Trustees* v. *Commissioner*, 35 B. T. A. 239), it merely adopted the language in section 115 (c) with respect to corporate liquidations and provided in section 117 (f) of the 1934 Act that amounts received upon the retirement of bonds "shall be considered as amounts received in exchange therefor."

B. *Congress, by Reenactment of Sections 201 (c) and 208 of the 1924 Act, Did Approve Article 1545 of Regulations 65*

The taxpayers contend (Brief pp. 21–24) that by adding to section 101 (b) of the 1928 Act the ex-

planatory phrase "(as hereinafter defined in this section)" not found in section 208 (c) of the 1926 Act, Congress disapproved the regulations, construed to apply the capital losses as well as the capital gains provisions to corporate liquidations.

The respondent submits that a comparison of the whole of section 208 of the 1926 Act with the whole of section 101 of the 1928 Act makes it appear that the addition is not one of substance but purely one of form in connection with the new form in which the capital gains and losses provisions, and the entire 1928 Act, were cast. Section 101 (a) provides for the tax on capital net gain as thereafter defined in the section. Section 101 (b) provides for the tax in case of the capital net loss as thereafter defined in the section. Section 101 (c) contains the definitions. Section 208 (a) of the 1926 Act, however, contained the definitions and when section 208 (b) providing for a tax on capital net gain and section 208 (c) providing for the tax in cases of a capital net loss were reached there was no need to make reference to definitions of capital net gain and capital net loss which had already been made in section 208 (a).

C. *The respondent's construction of section 115 (c) is not contrary to its history and purpose*

The taxpayers contend (Brief pp. 22–28) that there is no intrinsic evidence in the statute that Congress intended gain or loss on corporate liqui-

dations to be treated as capital gain or loss, in view of the fact that when the provisions of section 115 (c) of the 1928 Act first appeared in section 201 (c) of the 1918 Act there was no special provision for capital gains or losses. The taxpayers argued that when special provisions for sales or exchanges of capital assets were adopted in the 1921 and subsequent Acts it is not to be inferred that corporate liquidations are within such sales and exchanges. The respondent submits that Congress provided in section 201 (c) of the 1918 Act that corporate liquidations should be treated as sales or exchanges of stock generally and when Congress provided a special method for treating sales and exchanges as capital gains and losses and continued section 201 (c) of the 1918 Act it intended that the capital gains and losses provisions should also apply to corporate liquidations. Approval of the Treasury regulations treating gains upon corporate liquidations as capital gains by reenactment of the statute (*supra*, p. 10), and the Committee reports (*supra*, p. 12), indicate clearly that Congress intended losses and gains on corporate liquidations involving stock held more than two years to be treated as capital gains and losses.

The taxpayers' further contention (Brief pp. 28–30) that the decision of the court below fails to apply section 23 (e) is untenable. Section 101 (b) limits section 23 (e). A loss upon the sale or exchange of stock, including corporate liquidations,

is taken into account under 23 (e), and in this manner section 23 (e) is applied. But section 101 (b) limits the deduction under section 23 (e) if the stock has been held for more than two years (*supra*, p. 18).

Helvering v. *Bliss*, 293 U. S. 144, does not support the taxpayers' contention. That case involved section 23 (n) (2) of the 1928 Act, which expressly provided that charitable contributions should be allowed as deductions to an amount not in excess of 15 per centum of the taxpayer's "net income," and this Court rejected the Commissioner's contention that the deduction should be limited to 15 per centum of the taxpayer's "ordinary net income" under section 101. In the present case, however, the intention of Congress is clear that losses upon the sale or exchange of capital assets, including such losses on corporate liquidations should be limited by section 101.

The taxpayers' argument assumes far too much because logically it is not restricted to corporate liquidations, and if followed, all capital losses, even on the sale of stock to third persons, would not be subject to the limitations of section 101, because section 23 (e) also determines the deductibility of that type of loss although section 101 limits the amount of the deduction.

D. *The respondent's construction does not involve a harsh or absurd result*

The taxpayers contend (Br. pp. 20–22) that the decision of the court below leads to absurd consequences because a "small liquidating distribution is made to be more disadvantageous than no distribution at all" (Br. p. 20). The respondent submits that the different tax treatment of corporate liquidations and worthless stocks does not establish that corporate liquidations have been incorrectly treated by the court below, and, furthermore, the general rule for the treatment of corporate liquidations can not be modified to meet the supposed harsh result of a stated hypothetical case.

1. The fact that the deduction of the entire loss from worthless securities is not limited by the 1928 Act does not indicate that the statute should be construed as not limiting the loss in the entirely different situation where an amount is distributed in a corporate liquidation. Indeed, the treatment of worthless securities as a loss from the sale or exchange of capital assets under section 23 (k) (2) of the 1938 Act indicates that the asserted harshness of the unequal treatment of liquidating dividends and worthless securities under earlier acts is due to the failure to treat worthless securities as a sale or exchange rather than to the failure to treat corporate liquidations like worthless securities.

2. The suggestion that in the stated hypothetical case a harsh or illogical result will follow from the decision of the court below is answered by *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 321, in which this Court rejected the similar argument that unjust and unequal results would follow if the depletion allowance of 27½ percent of gross income from oil wells was based not on gross proceeds but upon gross proceeds less royalties paid. This Court pointed out that equally illogical results might ensue from the taxpayer's construction. Cf. *Lang* v. *Commissioner*, 289 U. S. 109, 113; *Echols* v. *Commissioner*, 61 F. (2d) 191, 192, 194 (C. C. A. 8th). So here, equally illogical results will ensue from an application of the section as the petitioners construe it. If Section 101 does not apply to losses from liquidation, it does not apply to gains from liquidation. Hence one who has a gain of $100,000 from the sale of a capital asset may at his option be taxed at 12½ percent (Section 101 (a)), while under petitioners' theory, if the same gain resulted from the liquidation of a corporation whose stock had been held more than two years, it must be returned at the normal and surtax rates—up to a total of 63 percent.

Moreover, "only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440. The taxpayers have failed to show that the loss is

clearly allowed by section 23 (e) apart from section 101. In fact, the respondent submits, the loss plainly is limited by section 101.

III

IN NO. 97 RECOVERY IS LIMITED IN ANY EVENT TO $127.64 WITH INTEREST BECAUSE THE REFUND CLAIM WAS FILED TOO LATE WITH RESPECT TO ANY ADDITIONAL AMOUNT

In No. 97 the estate of William A. White paid the income tax of $35,041.11 shown to be due on its return for 1929 in four approximately equal installments, as follows (R. 40):

March 15, 1930	$885.28
June 14, 1930	885.28
September 15, 1930	885.27
December 15, 1930	885.28

On July 28, 1931, the Bureau of Internal Revenue notified the executor of the estate that a redetermination of the tax liability for 1929 disclosed an overassessment of $757.64 but that the loss of $22,500 on the stock of Del-Bay Farms, Incorporated, was treated as a capital net loss. On December 31, 1931, the overassessment of $757.64 was refunded to the estate with interest of $43.53 (R. 40).

On December 15, 1932, more than two years after payment of the third installment of the tax on September 15, 1930, the executor filed a claim for refund of $446.06 based on the alleged error of treating the loss of $22,500 as a capital net loss. On May 9, 1933, the Commissioner notified the executor that the claim had been disallowed on the ground that the loss was a capital loss (R. 41).

The court below stated in its opinion that its decision on the merits made it unnecessary to consider this question of the statute of limitations (R. 47).

The controlling statute of limitations, section 322 (b) of the 1928 Act, provides:

> (b) *Limitation on allowance.*—
>
> (1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.
>
> (2) *Limit on Amount of Credit or Refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

It is apparent that as $757.64 was refunded to the estate on December 31, 1931, the remainder of the installment of $885.28 paid on December 15, 1930, was $127.64. It is submitted, therefore, that $127.64 with interest is the maximum recoverable by the taxpayer in this case in any event as it is the only "portion of the tax paid during the two years immediately preceding the filing of the claim" within the clear language of section 322 (b) (2). *Harr* v. *United States*, 20 F. Supp. 206, 208 (E. D. Pa.); *Broderick* v. *Anderson*, 23 F. Supp. 488, 493–494 (S. D. N. Y.). Compare *Blair* v. *Birkenstock*, 271 U. S. 348.

In *Blair* v. *Birkenstock*, *supra*, the 1919 income tax was paid in four installments in 1920. In 1924

the Commissioner determined that a refund should be made. Section 1019 of the 1924 Act provided that upon the refund of any tax erroneously or illegally assessed or collected interest shall be allowed from the date such tax was paid. The taxpayer contended, and the lower court held (55 App. D. C. 376), that interest should be computed on the excess of each quarterly payment over one-fourth of the proper amount of tax from the day of each quarterly payment. The Government, relying on sections 250 and 252 of the Revenue Act of 1918, in force when the tax was paid, and providing in part that an excess installment shall be credited against subsequent installments, contended that an excess quarterly payment became a tax erroneously collected under section 1019 of the 1924 Act only when the amount paid, added to previous payments, exceeded the agreed proper amount of the tax for that year.

This Court held (p. 353) that these sections, read together, show that the mere overpayment of an installment is treated as a payment on account of the tax "which is assessed for that year" and is not a tax erroneously collected within section 1019 of the 1924 Act and that interest may be recovered only from the date of a payment in excess of the total tax and subject to refund.

Provisions similar to sections 250 and 252 of the 1918 Act are found in sections 56, 57, 321, and 322 of the 1928 Act applicable to the present case. The

second sentence of section 321, similar to section 250 (b) of the 1918 Act, provides:

> If the amount already paid, on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

In the present case "the amount determined to be the correct amount of the tax" by the Commissioner was $2,783.47, the total amount paid, $3,541.11, less the overassessment and refund of $757.64. Consequently, pursuant to sections 321 and 322, the Commissioner determined that the tax had been overpaid in the sum of $757.64 on December 15, 1930, when the last installment of $885.20 was paid, and refunded part of that installment.[1]

The respondent submits, therefore, that under the refund claim filed on December 15, 1932, more than two years after payment of the third installment, there can be recovered only $127.64, the difference between the last installment payment of $885.28 and the refund of $757.64. On the authority of *Blair* v. *Birkenstock, supra,* this construction of the provisions of the 1928 Act has been adopted in *Harr* v. *United States, supra,* and *Broderick* v. *Anderson, supra.*

---

[1] The interest of $43.53 allowed on the refund of $757.64, less than a year's interest at 6 per cent., also makes it apparent that interest was computed from the date of overpayment on December 15, 1930, to a date within 30 days preceding the date of the refund check, approximately December 31, 1931, under section 614 (a) (2) of the 1928 Act.

In order to avoid this construction the taxpayer contended in his reply brief in the court below that this question of the statute of limitations should be determined by assuming that this Court will decide the question of the loss on the corporate liquidation in the taxpayer's favor, although the Commissioner and the court below decided that question otherwise, and that, accordingly, the correct tax is $2,337.41, the tax determined by the Commissioner in the amount of $2,783.47 minus the claimed refund of $446.06. If this assumption were correct, $318.42 of the third installment and all of the fourth installment would be an overpayment. On this assumption the taxpayer argues that the refund should be considered as having been applied first against the assumed first overpayment of $318.42 and the balance in the amount of $439.22 against the last installment, leaving a balance of the last installment of $446.06, to be refunded pursuant to the refund claim filed December 15, 1932.

The taxpayer's contention is erroneous because the Commissioner did not apply the refund to any part of the third installment. Section 321 authorizes the Commissioner to refund an amount which "exceeds the amount determined to be the correct amount of the tax," but does not authorize the refund of an amount which exceeds the amount which the taxpayer claims to be the correct amount of the tax. The Commissioner determined that the correct tax was $2,783.47 and that the tax had been

overpaid in the sum of $757.64 on December 15, 1930, and, accordingly, refunded that part of the last installment. Consequently, the taxpayer's alleged additional overpayment of $446.06 was made on December 15, 1930, only to the extent of $127.64 and the remainder of the alleged additional overpayment was made on September 15, 1930.

Section 322 (b) (2) prohibits any refund in excess of the portion of the tax paid during the two years immediately preceding the filing of the claim. After the refund the amount of $127.64 was the only portion of the tax paid during the two years immediately preceding the filing of the claim. The respondent submits, therefore, that recovery upon the present refund claim filed on December 15, 1932, is limited to the alleged overpayment of $127.64.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
J. LOUIS MONARCH,
A. F. PRESCOTT,
Special Assistants to the Attorney General.
EDWARD J. ENNIS,
Attorney.

NOVEMBER 1938.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following:

(a) 1½ per centum of the first $4,000 of the amount of the net income in excess of the credits against net income provided in section 25;

(b) 3 per centum of the next $4,000 of such excess amount; and

(c) 5 per centum of the remainder of such excess amount.

SEC. 12. SURTAX ON INDIVIDUALS.

(c) *Capital net gains and losses.*—For rate and computation of tax in lieu of normal and surtax in case of net incomes of not less than $30,000, approximately, or in case of net incomes, excluding items of capital gains, capital loss, and capital deductions, of not less than $30,000, approximately, see section 101.

* * * * *

SEC. 21. NET INCOME.

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions,

vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * * *

(d) *Distributions by corporations.*—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

(e) *Determination of gain or loss.*—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113.

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or * * *

* * * * *

(f) *Losses by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in

this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(b) *Tax in case of capital net loss.*—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly alocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(d) *Collection and payment of tax.*—The total tax determined under subsection (a) or (b) shall be collected and paid in the same manner, at the same time, and subject to the same provision of law, including penalties, as other taxes under this title.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to

which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * *

(h) *Definition of partial liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

Revenue Act of 1924, c. 234, 43 Stat. 253.

SEC. 201.

* * * * *

(c) Amounts distributed in complete liquidation of a corporation shall be treated

as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 202, but shall be recognized only to the extent provided in section 203. * * *

* * * * *

SEC. 208. (a) For the purposes of this title—

* * * * *

(2) The term "capital loss" means deductible loss resulting from the sale or exchange of capital assets.

Revenue Act of 1926, c. 27, 44 Stat. 9.

SEC. 201.

* * * * *

(c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 202, but shall be recognized only to the extent provided in section 203. * * *

* * * * *

SEC. 208. (a) For the purposes of this title—

* * * * *

(2) The term "capital loss" means deductible loss resulting from the sale or exchange of capital assets.

Treasury Regulations 74:

ART. 625. *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock, * * *.

* * * * * * *

Any gain to the shareholder may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 and articles 501–503. * * *

Regulations 65, Art. 1545 (promulgated under the 1924 Act) and Regulations 69, Art. 1545 (promulgated under the 1926 Act) are similar to the above regulations.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

Nos. 96, 97.—October Term, 1938.

Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White, Petitioners,
96 vs.
The United States.

Harold T. White, Sole Surviving Executor of the Estate of William A. White, Petitioner,
97 vs.
The United States.

On Writs of Certiorari to the Court of Claims.

[December 5, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question decisive of this case is whether, under §§ 23 and 101 of the Revenue Act of 1928, 45 Stat. 791, upon a liquidation of a corporation, stockholders' losses from their investment in its stock held for more than two years are ordinary losses deductible in full from gross income, or capital losses, 12½% of which is deductible under § 101 from the tax as computed without regard to such losses.

The decedent in each of these cases made an investment represented by shares of stock in a corporation. Upon complete liquidation of the corporation, more than two years later, the total liquidating dividends on the stock amounted to less than the cost of the investment. In their income tax returns for 1929 petitioners deducted from gross income the losses of their respective decedents. The commissioner ruled that the losses were capital net losses of which only 12½% was deductible, as provided by § 101, and he accordingly found deficiencies, which petitioners paid.

In the present suits, brought by petitioners in the Court of Claims to recover the payments of the deficiencies as overpayments of 1929 tax, recovery was denied. 21 Fed. Supp. 361. We granted certiorari, — U. S. —, to resolve a conflict between the decision below and that of the Court of Appeals for the Ninth Circuit

in *Chester N. Weaver Co.* v. *Commissioner*, 97 F. (2d) 31, certiorari granted, — U. S. —, which arose under related sections of the 1932 Revenue Act.

Section 23(e) of the 1928 Act declares that "In computing net income there shall be allowed as deductions . . . losses sustained during the taxable year . . . (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; . . . ." And sub-section (g) provides: "The basis for determining the amount of deduction for losses sustained . . . shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property."

These provisions of § 23 are qualified and restricted by § 101, which prescribes rates of tax applicable to capital net gains and the extent to which capital net losses are deductible in arriving at net taxable income. Section 101(c) (1) and (2) of the Revenue Act of 1928 defines "capital gain" as a "gain from the sale or exchange of capital assets" and "capital loss" as a "deductible loss resulting from the sale or exchange of capital assets." Section 101(c) (3) and (4) declares: " 'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year . . . ;" and " 'ordinary deductions' means the deductions allowed by section 23 other than capital losses and capital deductions." By § 101(c) (5) and (6) a "capital net gain" or "loss" results from the sale of "capital assets", which are defined by § 101(c) (8) as "property held by the taxpayer for more than two years", not including "stock in trade . . . or other property" held by the taxpayer "primarily for sale in the course of his trade or business."

Sections 23 and 101 place capital gains and losses as thus defined on a different basis from other types of gains and losses for the purpose of computing the tax. By § 101(a) a capital net gain as defined by § 101(c) (5) may, at the option of the taxpayer, be assessed at the rate of 12½% in lieu of all other taxes, and by § 101(b) a capital net loss, defined by § 101(6) as "the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain," may be deducted, only to the extent of 12½%, from the tax as computed without regard to the capital net loss. These sections, read together with §§ 12, 23 and 22, presently to be discussed, thus provide a complete scheme for ascertaining capital gains and losses from the sale or exchange of property and for bringing them into the computation of the tax on net in-

come, a scheme distinct from that applicable to other types of gains and losses resulting in ordinary net income, including those from sales and exchanges of property not capital assets.

The losses here sustained are concededly losses on investments of capital, entitled to recognition in the computation of taxable net income, but petitioners' contention is that as the losses did not result from a sale or exchange of the stock they are not capital losses within the meaning of § 101, which limits the deduction of such losses, and that in consequence they fall into the category of ordinary losses, deductible in full under § 23. The answer to this contention turns upon the meaning and effect of § 115(c), which relates to distributions by corporations and appears in Supplement B of the 1928 Act. The section provides in part:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. . . ."

Section 111 contains the provisions for computation of gain or loss from the sale or other disposition of property and refers, as does § 23(g), to § 113 as affording the basis for determining gain or loss upon sales or exchanges of property. By § 112(a) it is provided that "Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section."[1]

Petitioners concede that the command of § 115(c) that amounts distributed in complete liquidation of a corporation "shall be treated as in full payment in exchange for the stock" and that the "gain or loss . . . shall be determined under section 111," requires the gain or loss upon liquidation to be determined as are gains or losses upon sale of the stock under §§ 111, 113. The same method is adopted by 101 for determining gains or losses from sales of capital assets.[2] But they insist that the qualification that gain or loss "shall be recognized only to the extent provided in section 112" and the fact that the provisions of § 101 apply only to cases of

[1] The enumerated exceptions, none of which are applicable in the present case, relate to specified types of gains or losses upon exchange of property, some of which are excluded from the recognition accorded generally by the section to such gains and losses.

[2] The method of computing capital gains under § 101 is in substance that of §§ 111, 112 and 113, which is identified by §§ 22 and 23 with that pre-

sales or exchanges exclude the stockholders' gain or loss upon liquidation, which is not a sale or exchange, from the operation of the provisions of § 101 governing the computation of the tax.

Sections 101 and 115(c) are found in the provisions supplemental to the general provisions of sub-title B of the 1928 Revenue Act, which is concerned with rates of tax and computation of net income. Section 101 appears in Supplement A, relating to rates of tax, and § 115 in Supplement B, concerning computation of net income. Both supplements serve to modify or explain the general provisions. " . . . . the Supplemental Provisions are those which apply only to extraordinary classes of taxpayers or which apply only to the extraordinary transactions of ordinary classes of taxpayers." Report, Committee on Ways and Means, No. 2, 70th Cong., 1st Sess., p. 12. From the arrangement and general plan of the Act it is evident that the effect of §§ 101 and 115 upon each other is not to be ascertained alone by the comparison of the two sections or by noting the absence of any reference to either by the other, but by noting and comparing the effect of each upon the general provisions, to which reference must be made in the first instance for all computations of income tax.

Sections 12, 21, 22 and 23, found in sub-title B, General Provisions, to which §§ 101 and 115 are supplementary, govern computation of net income and of the tax. Subsection (c) of § 12, which fixes the rates of surtax, refers specifically to § 101 for the rate and computation of tax on capital net gains and losses.[3] Section 21 declares that net income means gross income computed under § 22, less the deductions allowed by § 23. As already noted, § 23(e), (g), providing for deductions of losses on sales or

---

scribed for ascertaining the gain to a stockholder upon corporate liquidation by § 115. By § 22(d) it is provided: "Distributions by corporations shall be taxable to the shareholders as provided in section 115"; and "(e) In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113." Section 101 in terms provides that "'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year." And § 23(g) provides: "The basis for determining the amount of deduction for losses sustained . . . shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property."

[3] Sec. 12(c): "Capital net gains and losses.—For rate and computation of tax in lieu of normal and surtax in case of net incomes of not less than $30,000, approximately, or in case of net incomes, excluding items of capital gain, capital loss, and capital deductions, of not less than $30,000, approximately, see section 101."

Only in the case of incomes in excess of $30,000, approximately, do the aggregate of the normal and surtax exceed the 12½% rate provided for in § 101.

exchanges of property, is restricted in its operation by the provisions of § 101. Otherwise, § 101 would have no application to deductible losses. These general provisions thus incorporate by reference those of § 101 and give to them controlling effect in the computation of the tax in cases of capital gains or losses upon the sale or exchange of capital assets. In addition, § 22(d) provides that "Distributions by corporations shall be taxable to the shareholders as provided in section 115," which in turn, as already noted, provides in paragraph (c) that liquidating dividends "shall be treated as in full payment in exchange for the stock," and that resulting gains or losses determined, as in the case of sales or exchanges of property, under § 111, are to be "recognized only to the extent provided in section 112," which also deals with sales and exchanges.

Section 115(c) and §§ 111 and 112, to which it refers, standing alone give no clue to the part which a stockholder's loss on liquidation is to play, in computation of the tax, more than they give in the case of gains and losses upon sales or exchanges of property. In each case they tell how the gain or loss is to be "determined" and declare that it shall be "recognized." But as § 115 says that the gain or loss upon liquidation is to be "recognized" only to the extent to which gains or losses upon sales or exchanges of property are recognized by § 112, it follows that in one case, as in the other, we must turn to the general provisions of the Act to learn what recognition is to be given to the gains or losses under §§ 12, 22 and 23, as supplemented by § 101. Admittedly the recognition accorded by § 112 to gains and losses on sales of capital assets is controlled by § 101, and § 115(c), with its reference to § 112, is explicit that gains and losses upon liquidations are to receive the recognition accorded to gains and losses upon sales of property. Consequently the recognition required by § 115(c) of gains and losses on liquidations must, we think, be taken to be the same as that accorded to gains and losses upon sales of property in the computation of the tax under the general provisions to which § 115 and § 112 are supplementary and to be subject to the same restrictions as are imposed upon recognition of gains and losses from sales by the provisions of the supplementary section 101. Stockholders' gains and losses upon liquidation of the corporation are thus taxed on the same basis as gains or losses upon sales and exchanges of property, with the rate of tax and deductions prescribed by § 101.

If this conclusion were doubtful, doubts would be put at rest by the judicial construction of § 115(c) as it appeared in the 1918 Act

and by the legislative history of §§ 101 and 115. The substance of the first sentence of § 115(c) of the 1928 Act appeared, but without the reference to §§ 111 and 112, in § 201(c) of the 1918 Act, which provided that "Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, . . ."[4] In *Hellmich* v. *Hellman*, 276 U. S. 233, it was held that this clause required a stockholder's gains upon liquidation to be treated as gains from the sale of property and therefore subject to the normal tax, although they were distributions from corporate earnings, and, under §§ 201(a), (b) and 216(a) dividends paid from such earnings were free from normal tax. The provisions of § 115(c) prescribing the treatment of liquidating dividends were thus, from the beginning, taken to refer to the computation of the tax as well as to the determination of the gain or loss.

The addition to the section in the 1924 and later Acts of the direction that gain or loss should be determined under the section corresponding to § 111 of the 1928 Act and recognized only to the extent provided in the section corresponding to § 112 of that Act requires no different result. For reasons already given it supports the conclusion that § 115(c), like its precursor, § 201(c) of the 1918 Act, as construed in *Hellmich* v. *Hellman, supra*, placed shareholders' gains and losses from liquidations upon the same basis, for computation of the tax, as gains and losses upon the sale or exchange of property. The reports of the Congressional Committees discussing § 201(c) of the 1924 Act make it plain that that section, the relevant portion of which is identical with § 115(c) of the 1928 Act, was intended to require gains upon corporate liquidations to be brought into the computation of the tax in the same manner as corresponding gains from sales.[5]

Article 625 of Treasury Regulations 74, interpreting §§ 101 and 115(c) of the 1928 Act, states in part: "Any gain to the shareholder [from a distribution in liquidation of a corporation] may, at his option, be taxed as a capital net gain in the manner

[4] Section 201(c) of the 1918 Act, omitted from the 1921 Act, was continued, so far as now relevant, in the form in which it later appeared in § 115(c) of the Act of 1928, as § 201(c) of the 1924 and 1926 Acts, and as § 115(c) of the 1932 and 1934 Acts. The provisions of § 101 for computing capital gains or losses upon sales or exchanges and taxing them on a different basis from ordinary income first appeared as § 206 of the Revenue Act of 1921, which was continued as § 208 of the Revenue Acts of 1924 and 1926 and as § 101 of the Revenue Acts of 1928 and 1932.

[5] The Report of the Senate Committee on Finance (Report No. 398, 69th Cong., 1st Sess.) states at page 11: " . . . The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the

and subject to the conditions prescribed in section 101 . . . . ." This regulation is a clear recognition that §§ 115 and 101, when read with the other sections of the Act, are interdependent and require stockholders' gains upon liquidation to be taxed as are the corresponding gains on sales of property. The regulation, in identical form, first appeared in Article 1545 of Regulations 65 and 69, applicable to §§ 201(c) and 208 of the Revenue Acts of 1924 and 1926, corresponding to §§ 115(c) and 101 of the 1928 Act, and was continued in Article 625 of Regulations 77 with relation to the corresponding sections, 115(c) and 101, of the 1932 Act.

The repeated reenactment of §§ 101 and 115(c), as they appear in the Revenue Acts of 1924, 1928, and 1932, is upon accepted principles a Congressional adoption of the regulation as correctly interpreting those sections and is Congressional recognition that §§ 101 and 115(c) are to be read together in order to ascertain the method by which gains and losses upon liquidation are to be taxed. The method, in the case of stock held for more than two years, is that applied by § 101 to capital gains and losses from the sale or exchange of property.

The fact that neither the decision in *Hellmich* v. *Hellman, supra,* nor the regulation deals specifically with losses does not admit of the conclusion that the stockholders' losses on liquidation are to be brought into computation of the tax on a basis different from gains and losses upon sales. Section 115(c) makes no distinction between the recognition of gains and the recognition of losses, and if one is controlled by the provisions of § 101 the other must be. No adequate basis has been suggested for such a distinction.

We attach no significance to the circumstance that the provisions of § 101 of the 1928 Act first appeared in the 1921 Act, while the controlling provisions of § 115(c) were enacted in the 1918 Act and in their final form in the 1924 Act. We accept petitioner's contention that all the provisions of § 101 are by its terms restricted

---

sale of property which may be treated as a capital gain. The treatment of liquidating dividends under the bill is substantially the same as provided for in the revenue act of 1918. A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the act and, furthermore, is the only method of treating such distributions which can be easily administered."

The Report of the House Ways and Means Committee (Report No. 179, 68th Cong., 1st Sess.) states with respect to § 201(c), at page 11: " . . . the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The proposed bill, as did the 1918 act, treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution."

to cases of sales or exchanges. But if, as we have said, § 115(requires the tax in case of liquidations to be computed upon t same basis as in case of sales of the stock, alteration in the method ascertaining the tax could be made more readily by adding § 101 amending it than by amending § 115(a), so long as it is the pu pose to treat gains and losses on liquidation no differently fr gains and losses on sales. No. 304, *Helvering* v. *Chester N. Weav Co.*, decided this day.

Petitioner argues that the construction which we think corr leads to the harsh and absurd consequence that a small liquidati dividend is more disadvantageous to the taxpayer than no distrib tion at all in the case where the stock has become worthless. Th is an argument, more properly addressed to Congress, that t statute should have gone further than it did by providing that t loss in the case of worthless securities should be treated as a l upon their sale, as was later done by § 23(g) (2) of the 1938 A But it is not persuasive that we should disregard the language a history of the pertinent sections, with consequences equally har and absurd, to adopt the construction for which petitioners co tend. Cf. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312, 3

We are not impressed by the argument that, as the question he decided is doubtful, all doubts should be resolved in favor of t taxpayer. It is the function and duty of courts to resolve doub We know of no reason why that function should be abdicated in tax case more than in any other where the rights of suitors tu on the construction of a statute and it is our duty to decide wh that construction fairly should be. Here doubts which may ar upon a cursory examination of §§ 101 and 115 disappear when th are read, as they must be, with every other material part of t statute, *Hellmich* v. *Hellman*, *supra*, 237, and in the light of th legislative history. Moreover, every deduction from gross inco is allowed as a matter of legislative grace, and "only as there is cl provision therefor can any particular deduction be allowed . a taxpayer seeking a deduction must be able to point to an app able statute and show that he comes within its terms." *Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440.

We have considered, but find it unnecessary to discuss, o arguments of petitioners of lesser moment.

Affirme

Mr. Justice McReynolds, Mr. Justice Butler, and Mr. J Roberts dissent.